

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 341

B. I. SALINGER, JR., APPELLANT,

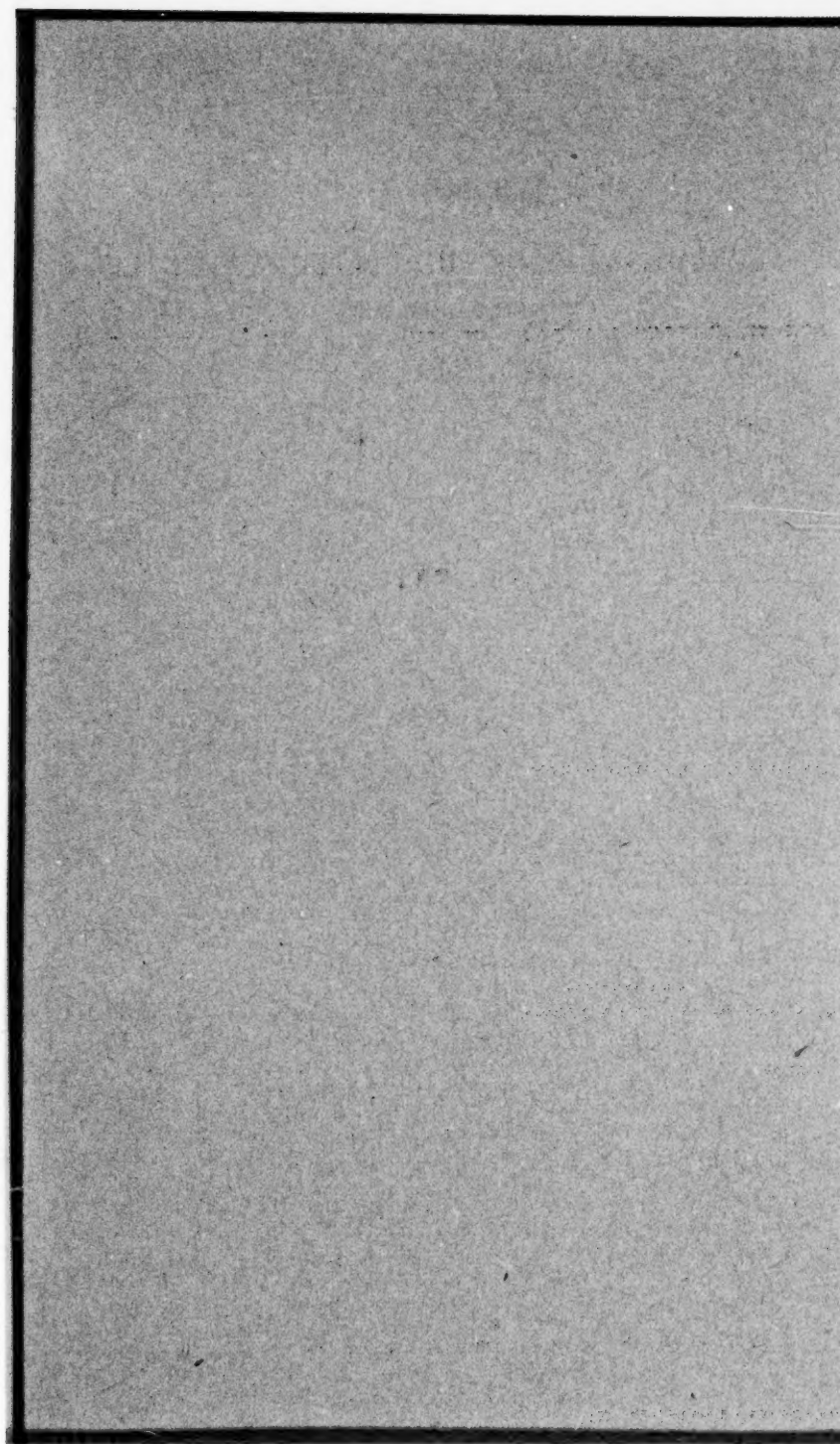
vs.

**VICTOR LOISEL, UNITED STATES MARSHAL FOR THE
EASTERN DISTRICT OF LOUISIANA**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA**

FILED MAY 24, 1923

(29,646)



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4. That, upon information and belief the said commitment was issued by Arthur H. Brown, Esquire, United States Commissioner, by virtue of a certain indictment found against petitioner in the proceeding entitled "United States versus B. I. Salinger, Jr., No. 983 W. D., in the District Court of the United States for the District of [fol. 3] South Dakota, Western Division," charging petitioner with the violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto annexed as part hereof and for identification herewith marked "Petitioner's Exhibit B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him (and as to them he cannot say for he has not been permitted any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa, for he was never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one, nor at the time of nor since the return of said indictment.

6. That said indictment is void, and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

[fol. 4] (b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

(d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution or furtherance of any scheme to defraud because the indictment and said

letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section Two of Article Three thereof.

[fol. 5] (f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of The District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention removal or trial under said indictment or by virtue of any process thereunder, would be in violation of the Fifth and Sixth Amendments and of Section Two of Article Three of the Constitution of the United States.

[fol. 6] 7. That petitioner shows further that no motion has ever been made by him or for him or with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District and without his motion or consent, the said indictment *all* all proceedings thereunder, were upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South Dakota, transferred to that last named Division, and that petitioner's detention for and removal to said Southern Division of the District

of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

8. Upon information and belief, the said commitment is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the statutes of the United States, and will, if the writ herein prayed for be not granted, be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within said District of South Dakota.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this Court at a [fol. 7] time to be by this Court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that this Court may proceed in the summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the thirty-first day of March, A. D. 1923.

(Signed) St. Clair Adams, Attorney for Petitioner, 416 Carondelet Bldg.

[fol. 8] Affidavit of B. I. Salinger, Jr., to above paper omitted in printing.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF
LOUISIANA

ORDER ISSUING WRIT OF HABEAS CORPUS

Now on this thirty-first day of March, A. D. 1923, the above matter coming on upon the petition for the issuance of a writ of habeas corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this Court at 11 o'clock A. M. of the Sixth day of April A. D. 1923; and the petitioner is hereby admitted to bail pending said hearing in the sum of Five Thousand 00/100 Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the Court may from time to time direct.

By the Court.

(Signed) Rufus E. Foster, Judge.

[fol. 9]

ORDER OF COMMITMENT

Now on this — day of March, A. D. 1923, the surety named in a certain recognizance, dated the 20th day of February, A. D. 1923, for the appearance of B. I. Salinger at a term of the District Court of The United States of the Southern Division of the District of South Dakota, beginning on the third day of April, 1923, to answer an indictment for violation of Section 215 of the Penal Code of the United States, having in my presence at the City of New Orleans, in the Eastern District of Louisiana, delivered to the United States Marshal of said District, the body of B. I. Salinger, named as principal in said bond, the said B. I. Salinger is hereby committed to the custody of said Marshal, pursuant to and by virtue of said indictment, a certified copy of which is on file in my office, to be by him held until discharged in due course of Law.

— — —, United States Commissioner for the Eastern District of Louisiana, New Orleans, Division.

[fol. 10] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

[Title omitted]

ANSWER AND RETURN TO PETITION AND WRIT FOR HABEAS CORPUS—
Filed April 20, 1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division.

Now into court comes Victor Loisel, United States Marshal for the Eastern District of Louisiana, the defendant herein, through L. P. Bryant, Jr., Assistant United States Attorney, and for answer to Plaintiff's petition says:

I. For lack of sufficient information to justify a belief, Respondent accordingly denies the allegations of fact contained in Article I of Plaintiff's petition.

II. Respondent admits that petitioner has heretofore been actually imprisoned and restrained of his liberty, as set forth in Article II of Plaintiff's petition, but Respondent shows that petitioner is now at liberty, under bond. Further answering, respondent shows that petitioner was actually imprisoned and restrained of his liberty by Respondent, as aforesaid, on the 31st day of March, 1923, when petitioner voluntarily surrendered himself into the custody of Respondent; that subsequent to said voluntary surrender an order of commitment for the said petitioner was then received by Respondent; all as will in greater detail be hereinafter set forth.

III. For answer to Article III, Respondent adopts as his answer, his answer to Article II of Plaintiff's petition.

IV. Respondent admits the allegations of fact contained in Article IV of Plaintiff's petition.

V. Respondent denies the allegations of fact contained in Article V of Plaintiff's petition.

[fol. 11] VI. Answering Article VI of Plaintiff's petition and the sub-sections a, b, c, d, e, f and g thereof, Respondent denies all the allegations of fact therein contained.

VII. Respondent admits that the indictment was found by a Grand Jury in the Western Division of the District of South Dakota, and thereafter, by order of the Court, the place of trial set for the Southern Division of said District of South Dakota, but that said order of Court, was made in open court and in the presence of attorneys representing petitioner herein.

Respondent denies all other allegations contained in Article VII of Plaintiff's petition.

VIII. Respondent denies all the allegations of fact contained in Article VIII of Plaintiff's petition.

Now for further answer and return to the writ, herein, Respondent shows:

That petitioner herein was indicted by a Grand Jury of the United States, drawn from the body of the District of South Dakota, at a term of court for said district held at the City of Deadwood within the Western Division of said District, on the third Tuesday of May, 1922; that a bench warrant was thereafter issued by the Judge of the District Court for the District of South Dakota, under the seal of said court, and placed in the hands of the Marshal for service upon the petitioner within the Southern District of California, but that petitioner escaped from said Southern District of California, before said bench warrant could be served and came to the Northern District of Iowa, and there, on or about the 8th day of June, 1922, surrendered to a Commissioner of said District for the Northern District of Iowa, and gave bond in the penal sum of \$10,000, for his appearance before the District Court for the District of South Dakota at the opening day of the October term thereof, to be held on the third Tuesday of October, 1922; that after giving said bond petitioner was released from custody, and at the opening day of the term of the District Court in the District of South Dakota, held on the third Tuesday in October, 1922, defendant failed to appear as conditioned [fol. 12] in said bond, and thereupon, such proceedings were had; that said bond was forfeited and a bench warrant issued by the District Court for the arrest of petitioner; that thereafter, and on or about the 17th day of October, 1922, petitioner was arrested in the City of New York, in the Southern Division of New York, and removal proceedings were instituted seeking to remove the petitioner from the Southern District of New York to the District of South Dakota, for trial; that petitioner was regularly committed by United States Commissioner for the Southern District of New York to the

District Court for the Southern District of New York, for an order of removal; that thereupon, and on or about the 8th day of November, 1922, petitioner sued out a writ of habeas corpus from the District Court for the Southern District of New York, and after such proceedings were had, that thereafter and on or about the 14th day of November, 1922, said writ of habeas corpus was quashed by the District Court for the Southern District of New York, and petitioner remanded to the custody of the Marshal for the Southern District of New York, for removal to the District of South Dakota; that appeal was taken by petitioner from said order of removal, to the Circuit Court of Appeals for the Second Circuit, and such proceedings as thereafter had resulted in an affirmance of the order of removal granted by the District Court for the Southern District of New York and the mandate was sent down from the Circuit Court of Appeals for the Second Circuit of the United States, to the District Court of the United States for the Southern District of New York, on the 14th day of March, 1922; that upon the receipt of said mandate the District Court for the Southern District of New York, on the 16th day of March, 1923, made its order of removal directing the Marshal of said District to transport the petitioner, B. I. Salinger Jr., to the District of South Dakota, and there place him in the custody of the United States Marshal for said District; that pending said appeal petitioner herein had been given his liberty, under bond, in the penal sum of \$10,000, and upon the issuance of the order of removal, as above set forth, petitioner appeared before the District Court for the Southern District of New York, and asked leave to give a bond conditioned for his appearance before the District Court of the District of South Dakota as in lieu and substitution for his removal by the Marshal; that the order of removal was made by Judge [fol. 13] Augustus N. Hand, one of the Judges of the District Court for the Southern District of New York, but that the application of petitioner for a bond was made before Judge Wm. C. Vanfleet, one of the other Judges of said District, and thereupon, an order was made by the said Judge, Wm. C. Vanfleet, that petitioner be permitted to give a bond in the penal sum of \$15,000, conditioned for his appearance before the District Court for the District of South Dakota, for trial at the opening day of the April, 1923, term thereof, holden at Sioux Falls, within said District; that said order allowing petitioner to give bond for his appearance before the District Court of the District of South Dakota, is of date March 20th, 1923, and that thereupon, and in pursuance of said order, petitioner herein gave a bond to the United States of America in the penal sum of \$15,000, wherein he signed as principal, and wherein the Southern Surety Company of Des Moines, Iowa, a corporation, signed as surety, conditioned for the appearance of petitioner, herein for trial in the District Court of the United States for the District of South Dakota, to be holden at the City of Sioux Falls, in said District on the First Tuesday of April, 1923, to-wit: the 3rd day of April, 1923, at the hour of Ten a. m., upon the indictment filed in said district which said bond was approved and filed on the said 20th day of March, 1923, and petitioner was thereupon allowed his liberty; that on the

31st day of March, 1923, petitioner herein and one Edward A. Parsons, an attorney-at-law, of the City of New Orleans, Louisiana, appeared at the office of Respondent, at the Federal Building in the City of New Orleans, and the said Edward A. Parsons, declaring himself to be attorney of the Southern Surety Company of Des Moines, Iowa, introduced petitioner to a Deputy of Respondent as one B. I. Salinger, Jr., and stated that he desired to surrender petitioner to Respondent in behalf of his client, the said Southern Surety Company; that the said Parsons withdrew and the said Deputy States to petitioner that he did not think he had any right to accept his surrender; that thereupon, petitioner stated to said Deputy that he was a lawyer and protested that the Surety had a right to surrender him to Respondent, and that any Marshal of any District of the United States had the right to accept the custody of a bonded party when he was surrendered by his bondsman even though the party-defendant had given bond to appear in a jurisdiction other than the one in which he might attempt to surrender himself; that while en-[fol. 14] gaged in said controversy and argument, and without any act of restraint being imposed upon the petitioner, the commitment issued by Arthur H. Browne, Esq., in the form of the copy attached to the petition herein, was handed to the said Deputy, whereupon almost coincident therewith, the said Deputy had received word from the office of the Clerk of the United States District Court for the Eastern District of Louisiana, to the effect that a writ of habeas corpus had been granted in favor of petitioner, the said Deputy being requested by the said Clerk, or one of his Deputies, to repair to the Clerk's office upon the floor of the Federal Building, immediately below that of the United States Marshal's Office; that pursuant to said request the said Deputy, in company with petitioner, did immediately go to the said Clerk's Office for the purpose of being served with said writ, the petitioner, in the meantime, that is to say, before actually reaching the Clerk's office, having paid the said Deputy the sum of \$2.00 in cash to defray the legal cost of service of said writ upon the United States Marshal; that the said writ was then and there delivered to the said Deputy to whom there was presented coincident therewith, a bond in the sum of \$5,000, conditioned that the petitioner should appear before the United States District Court for the Eastern District of Louisiana, upon the hearing upon the petition of said writ of habeas corpus; that upon examination of said bond by the said Deputy, and ascertainment that the same was in the amount as provided for by order of this Honorable Court, petitioner was thereupon released from custody. Respondent shows that the only custody and detention of petitioner was as above set forth, and that he does not now have the custody of petitioner.

Wherefore: Respondent prays that the writ of habeas corpus may be dismissed and that the petitioner be dealt with as law and justice may require.

(Signed) L. P. Bryant, Jr., Asst. U. S. Atty.

[fol. 15] Affidavit of Victor Loisel to above paper omitted in printing.

[fol. 16] EXHIBIT TO ANSWER: INDICTMENT—Filed March 31,
1923

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN
DIVISION OF THE DISTRICT OF SOUTH DAKOTA IN THE EIGHTH
JUDICIAL CIRCUIT

At a stated term of the District Court of the United States of America for the Western Division of the District of South Dakota begun and held at the city of Deadwood, within and for the district and circuit aforesaid, on the third Tuesday of May in the year of our Lord one thousand nine hundred and twenty-two.

The Grand Jurors of the United States of America, good and lawful men, summoned from the body of the District aforesaid, then and there being duly empanelled, sworn and charged by the court aforesaid to diligently inquire and true presentment make for said District of South Dakota, in the name and by the authority of the United States of America, upon their oaths, do present:

That Fred C. Sawyer, whose full first name is to the Grand Jurors unknown, C. H. Burlingame, whose full first name is to the Grand Jurors unknown, and B. I. Salinger, Jr., whose full first name is to the Grand Jurors unknown, hereinafter called defendants, at and about the month of November, 1917, the exact date being to the Grand Jurors unknown, did devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from the Midland Packing Company, a corporation thereafter to be created, A. L. Will, Frank Groesbeck, Thomas Mansheim, C. H. Halley, Martin Christensen, P. L. Peterson, Alfred Christensen, Will Hartman, G. A. Hegstrum, Theodore Anker, P. C. Peterson, W. M. Rowley, W. J. Shanard, Archie C. Jensen, and divers other persons whose names are to the Grand Jurors unknown (a class of persons residing within the United States of America, not susceptible, by reason of their great number and the lack of information on the part of the Grand Jurors, of being named herein, but comprising any and all persons whom the defendants could induce to purchase stock of said corporation, the persons so intended to be defrauded being hereinafter referred to as the victims or said victims), by inducing by fraudulent representations, pretenses and promises, and by fraudulent artifices and devices, said victims, as hereinafter more fully set forth, so intended to be defrauded, to part with their money and property in the purchase of shares of stock in the said Midland Packing Company, a corporation thereafter to be created, said scheme and artifice being more particularly set forth as follows:

That the defendants, on or about the 12th day of March, 1918, caused to be incorporated the Midland Packing Company, and that at all times from March 12, A. D. 1918, to May 7, A. D. 1920, the Midland Packing Company was a corporation organized and existing under and by virtue of the laws of the State of Iowa, and from

March 12, 1918, to January 31, 1919, the authorized capital stock of the said Midland Packing Company was Three Million Five Hundred Thousand Dollars (\$3,500,000), consisting of twenty-five [fol. 17] thousand (25,000) shares of preferred stock of the par value of One Hundred Dollars (\$100) per share, and ten thousand (10,000) shares of common stock, of the par value of One Hundred Dollars (\$100) per share, and at all times from the first day of February, 1919, to the 7th day of May, 1920, the authorized capital stock of said Midland Packing Company was Eight Million Dollars (\$8,000,000), consisting of seventy thousand (70,000) shares of preferred stock of the par value of One Hundred Dollars (\$100) per share, and ten thousand (10,000) shares of common stock of the par value of One Hundred Dollars (\$100) per share;

That at all times from March 12, 1918, to May 7, 1920, the said Fred C. Sawyer was President of said Midland Packing Company, the said C. H. Burlingame was the Secretary and Treasurer of said Midland Packing Company, and from March 23, 1918, to May 7, 1920, the said B. I. Salinger, Jr., was the Vice-President and General Counsel of the said Midland Packing Company; that the said Midland Packing Company will be hereinafter referred to as the corporation or said corporation; the said Fred C. Sawyer will be hereinafter referred to as Sawyer; the said C. H. Burlingame will be hereinafter referred to as Burlingame, and the said B. I. Salinger, Jr., will be hereinafter referred to as Salinger, and the said Sawyer, Burlingame and Salinger will be hereinafter referred to collectively as the defendants or said defendants;

That at all times from March 23 1918, to November 9, 1918, one H. M. Baine, whose full first name is to the Grand Jurors unknown, was a stock salesman and agent of the said corporation, sometimes referred to as director of finances; and from November 10, 1918, to May 7, 1920, one Tom G. Taylor, whose full first name is to the Grand Jurors unknown, was a stock salesman and agent of, and sometimes referred to as a director of finances of said corporation, and during the times aforesaid transacted business under the name and style of Tom G. Taylor & Company, or Tom G. Taylor & Co.; that the said H. M. Baine will be hereinafter referred to as Baine, and the said Tom G. Taylor will be hereinafter referred to as Taylor;

That heretofore, to-wit: On the dates and at and during the times hereinbefore specified, in the District of South Dakota and within the Southern Division thereof, and within the jurisdiction of this court, the said defendants, having heretofore devised, and intending to devise a scheme and artifice to defraud said corporation and said victims of its and their money and property in and by the various false and fraudulent pretenses, representations, promises, practices, artifices and devices as hereinafter more particularly set forth;

That is to say, that the defendants, at the times and with the intent and for the purpose as aforesaid, and as a part of the said scheme and artifice to defraud as aforesaid, caused the said Midland Packing Company to be incorporated as a part of said scheme, and caused the said Baine to enter into negotiations with Statler &

Company, Packers, and H. Statter for the purchase of the property hereinafter described, and to be used in the manner as hereinafter stated; and having caused the said Baine to enter into an agreement with the said Statter & Company, Packers, and H. Statter for the purchase of the said property for the sum of Two Hundred Fifty Thousand Dollars (\$250,000) or thereabouts, the exact amount being to the Grand Jurors unknown, and intending to cause themselves to be elected as the officers of said corporation and to make use of their said positions for and in aid of the purposes hereinafter stated, and thereafter having caused themselves to be elected as such officers as hereinbefore stated, did, on or about the 18th day of June, A. D. 1918, the exact date being to the Grand Jurors unknown, cause to be issued to H. Statter forty-eight hundred fifty-[fol. 18] four (4,854) shares of the capital stock of said corporation, as and for the ostensible and pretended consideration or purchase price to be paid to the said H. Statter and Statter & Company, Packers, a corporation organized under the laws of the State of South Dakota, for certain property referred to and described as the packing plant, assets and property of said Statter & Company, Packers, for the purchase of which said property the defendants had theretofore, on or about the 29th day of March, 1918, caused the said corporation to make and enter into an ostensible and pretended contract with said Statter & Company, Packers, in which said contract the consideration or purchase price for said property was fixed at Four Hundred Ninety-three Thousand Nine Hundred Dollars (\$493,900), and on the purchase of which said property the defendants had theretofore and as a part of said scheme and artifice to defraud, on or about November 6, 1917, the exact date being to the Grand Jurors unknown, caused the said Baine to negotiate and contract for as aforesaid for the said corporation, for a consideration of Two Hundred Fifty Thousand Dollars (\$250,000), and in connection with the issuance of the said forty-eight hundred fifty-four (4,854) shares of the capital stock of said corporation and as part of the said transaction, the defendants, pretending to act for said corporation, pretended to purchase from the said H. Statter twenty-two hundred fifty (2,250) shares of the said capital stock of said corporation, and in connection therewith caused to be assigned and transferred to the defendant and other persons whose names are to the Grand Jurors unknown, for the use and benefit of the defendants, of the said forty-eight hundred fifty-four (4,854) shares, twenty-three hundred fifty-four (2,354) shares, which said twenty-three hundred fifty-four (2,354) shares of stock the defendants thereafter caused to be sold as the stock and property of said corporation, for their own use and benefit; that the said ostensible and pretended issuance of the said forty-eight hundred fifty-four (4,854) shares of stock to the said H. Statter and the said pretended contract of purchase of the said property for the ostensible consideration of Four Hundred Ninety-three Thousand Nine Hundred Dollars (\$493,900) were colorable only and made with the intent to deceive and defraud the said corporation and victims;

That the defendants had theretofore, as a part of the said scheme

and artifice to defraud, caused representations to be made to the Executive Council of the State of Iowa, under and in pursuance of the provisions of Chapter 71 of the Acts of the Thirty-second General Assembly of the State of Iowa, in connection with an application to the said Executive Council for authority to issue capital stock of said corporation in and for the ostensible purchase of the said property from the said Statter & Company, Packers, and H. Statter, and as a pretended appraisal of the said property, that the value of the said property and the price to be paid therefor by said corporation was Five Hundred Sixty-four Thousand Nine Hundred Dollars (\$564,900), and in reliance on such representations said Executive Council issued to the said corporation authority to issue its capital stock in the sum of Four Hundred Eighty-five Thousand, Four Hundred Dollars (\$485,400), subject to encumbrance against the same of Seventy-nine Thousand Dollars (\$79,000) or thereabout, in and for the purchase of the said property; that the defendants caused the said forty-eight hundred fifty-four (4,854) shares of the capital stock of said corporation to be issued as aforesaid, as the ostensible and pretended consideration and purchase price of the said property from the said Statter & Company, Packers, and H. Statter, subject to said encumbrance, whereas they, the defendants, had in fact purchased the said property and caused the same to be purchased [fol. 19] chased, for a consideration of Two Hundred Fifty Thousand Dollars (\$250,000), and caused said sum to be paid to the said Statter & Company, Packers, and H. Statter, therefor, in money, notes, bonds, certificates of deposit and capital stock of said corporation, the exact amounts, kinds and denominations being to the Grand Jurors unknown, and did thereby and in the manner and by the pretenses and devices aforesaid, cause to be issued of the capital stock of the said corporation, twenty-three hundred fifty-four (2,354) shares thereof, without any consideration to the said corporation, and for their own use and benefit; that the defendants did thereby and in the manner aforesaid, purchase the said property from the said Statter & Company, Packers, and H. Statter, and cause the same to be purchased for the said corporation, for a consideration of Two Hundred Fifty Thousand Dollars (\$250,000), which it caused to be paid for in the manner aforesaid, and caused the said forty-eight hundred fifty-four (4,854) shares of the capital stock of said corporation to be issued as and in the manner aforesaid, as a pretended consideration for the purchase of said property and to enable them, in the manner aforesaid, to convert and appropriate to their own use and benefit, the said twenty-three hundred fifty-four (2,354) shares of the capital stock of said corporation, without any consideration to the said corporation, and did thereby and in the manner aforesaid, convert and appropriate to their own use the said twenty-three hundred fifty-four (2,354) shares of the capital stock of the said corporation, in fraud of the said corporation and victims, and in pursuance of said scheme and artifice to defraud as heretofore set forth;

That as a further part of said scheme and artifice as aforesaid, the defendants on or about the 22d day of April, 1918, for the purpose

of securing authority from the South Dakota State Securities Commission under the provisions of Chapter 319 of the Session Laws passed by the Legislative Assembly of the State of South Dakota in 1913, made and caused to be made to the said South Dakota State Securities Commission an application for authority to sell the capital stock of said corporation in the State of South Dakota, and in and as a part of the said application, they caused to be filed and presented a statement purporting to be a complete and correct statement of the assets and liabilities of said corporation, in and by which they stated and represented that the valuation of the said properties of said Statter & Company, Packers, had been presented to the Executive Council of the State of Iowa for valuation in compliance with the laws of the State of Iowa, and that the said Executive Council, after having fully canvassed and investigated the value of said property, had authorized the said corporation to issue Four Hundred Eighty-five Thousand Four Hundred Dollars (\$485,400) of its capital stock for the payment of said property, and that the said corporation had been able by contract to make the purchase of said property for an amount totaling Four Hundred Fourteen Thousand Four Hundred Dollars (\$414,400), thereby making a net saving to the said corporation of Seventy-one Thousand Dollars (\$71,000) over the authorized valuation of said property by the said Executive Council of Iowa, thus reducing ultimately the promotion expenses of said corporation very materially, thereby intending by the said statements and representations to represent to and have the said South Dakota State Securities Commission believe and understand that the Executive Council of the State of Iowa had, in pursuance of law, fully canvassed and investigated the value of said property and authorized the said issue of Four Hundred Eighty-five Thousand Four Hundred Dollars (\$485,400) of its capital stock for the payment of said property as the true value thereof, and also representing and [fol. 20] intending to represent to the said South Dakota State Securities Commission, that the said corporation had been able to make the purchase of said property for an amount totaling Four Hundred Fourteen Thousand Four Hundred Dollars (\$414,400) and had thereby saved to the said corporation in said transaction, the sum of Seventy-one Thousand Dollars (\$71,000), over and above the authorized valuation of said property by the Executive Council of Iowa, and had thereby reduced the promotion expenses of said corporation in the sum of the said Seventy-one Thousand Dollars (\$71,000) whereas the defendants had, by and through the said Baine, as hereinbefore stated, purchased and caused to be purchased, the property aforesaid from the said Statter & Company, Packers, and H. Statter, for the sum of Two Hundred Fifty Thousand Dollars (\$250,000) or thereabouts, and that on or about May 7, 1918, by means of such statements and representations, the defendants, in the manner aforesaid, caused and induced said South Dakota State Securities Commission to issue authority to the said corporation to sell the capital stock of said corporation up to the amount of One Hundred Thousand Dollars (\$100,000) in the State of South Dakota, and thereafter, by means of the said statements and representations and other

false and fraudulent statements and representations, the particulars of which are to the Grand Jurors unknown, the defendants did, on or about July 25, 1919, cause and induce the said South Dakota State Securities Commission to authorize said corporation to sell its capital stock in the State of South Dakota, up to the amount of Two Hundred Thousand Dollars (\$200,000); that by means of the authority so granted by the said South Dakota State Securities Commission, the defendants caused the capital stock of the said corporation to be sold, in the State of South Dakota, in and during the years 1918, 1919 and 1920, in an amount largely in excess of the sum of Two Hundred Thousand Dollars (\$200,000), by the means and in the manner as hereinafter set forth:

That as a further part of said scheme and artifice to defraud, the defendants, in and as a part thereof, caused an agreement to be entered into between the said corporation and the said Baine, bearing date March 23, 1918, in and by which the defendants caused the said corporation to agree with the said Baine that he should have the exclusive right to sell all of the capital stock of said corporation at par, and the exclusive option to sell, in the event of an increase in the authorized capital stock of said corporation, all such increase in capital stock, upon the same terms and conditions as set forth in the said contract dated March 23, 1918, in connection with the then existing authorized capital stock of said corporation, which said contract was to provide and did provide, among other things, that at the time subscriptions for the agents, at least twenty-five per cent (25%) of the selling price of such capital stock of said corporation should be taken by said Baine for his stock should be collected in cash, and that promissory notes, payable to the said corporation, to become due not more than one year from the date of the subscription, might be taken for the balance of such subscription price, provided, however, that the said Baine should endeavor to secure as large a share of the said subscriptions in cash as possible, and the shortest possible maturing date on the said notes; that the said Baine would pay all the expenses of selling said stock, including compensation of salesmen and expense of providing and circulating sales literature and advertising, that the said Baine would devote his time to the sale of said stock until the same should be sold, and in the event of the acceptance by him of the sale of any stock of any increased capitalization of said corporation, that he would devote his time to the sale of such stock incident to such increased capitalization, and that as full compensation to the said Baine for the sale of said stock, the said corporation would pay him a sum equal to twenty per cent (20%) of the sale price of the stock sold by said Baine or his agents, which said twenty per cent was to be paid out of the initial payment received on such stock subscriptions:

That thereafter, on or about June 15, 1918, the exact date being to the Grand Jurors unknown, the defendants caused the said corporation to enter into a further agreement with the said Baine, which said agreement provided that in addition to the flat commission of twenty per cent (20%) provided for in the said contract dated March 23, 1918, for all stock of said corporation sold by said Baine

to persons resident elsewhere than in the State of South Dakota, excepting also such stock as was specifically eliminated from the payment of such compensation in said contract of March 23, 1918, the said corporation should pay to said Baine an additional five per cent (5%) commission in cash for all sales of the said corporate stock so to be made by him under the terms of said contract, except that no cash commission should be paid for the resale of Two Hundred Twenty-five Thousand Dollars (\$225,000) of the capital stock of said corporation which had been re-purchased and that the said Baine should receive only Four Thousand Dollars (\$4,000) in cash out of the proceeds of the sale of a certain one hundred sixty-five (165) shares of said stock, further details of the said 165 shares of said stock being to the Grand Jurors unknown;

That thereafter, on or about November 9, 1918, the said contract so made and caused to be made by the defendants between the said corporation and the said Baine, were sold, assigned and transferred, with all of the right, title and interest of the said Baine therein, to the said Tom G. Taylor & Company;

That it was further intended by the defendants as a part of the said scheme and artifice, that the said Baine and Taylor would, in pursuance of the contract hereinbefore mentioned, employ a large number of stock salesmen and agents to call upon persons to be solicited to purchase stock of said corporation for the purpose of creating confidence in the minds of such persons, hereinafter referred to as victims and prospective victims, of legitimate purposes and objects of the said corporation to erect and successfully operate at Sioux City, Iowa, a large packing plant, to be operated at a large profit for the benefit of the said victims, who would purchase the stock of said corporation, and it was intended that the said salesmen and agents would represent and pretend to such victims that the defendants were experienced manufacturers of meat products and well qualified to operate economically and at a large profit, a large packing plant at Sioux City, Iowa, which would result in large profits to the said victims; that the defendants intended that the capital stock of said corporation would be sold to such victims upon the promise and representation that it would pay seven per cent (7%) annual interest or dividends from the date of subscription on the amount thereof, and that the annual interest or dividend on the amount of such subscriptions would increase until the annual interest or dividends would amount to forty per cent (40%) of which subscriptions, and that the said seven per cent interest or dividends to be received on the stock so to be subscribed for by the said victims, would pay the interest of six per cent (6%) on the notes given by the said victims to the said corporation in pursuance of such subscriptions, leaving a margin of one per cent (1%) profit per annum thereon; that the said victims would not be called upon to pay notes so obtained and to be obtained, when due, as the increase in the value of the stock and the dividends to be received up to the time of the maturity of said notes, would be sufficient to take up the said notes given by said victims; that it would also be represented to such victims that at any time they were dissatisfied with their purchase of

such stock obtained as aforesaid, that the same would be resold by the said corporation and that the said salesmen and agents, without loss to the victims and that the notes so to be obtained would be taken up and surrendered to them, and that the said victims would not be required to pay the same to the said corporation;

And the defendants intended to and did, as a further part of said scheme and artifice, insert large advertisements in various publications sent by and through the United States mails to a large number of farmers located in the States of Iowa, South Dakota, Nebraska and elsewhere, all of which were intended to reach and be read by the said victims, the purpose of said advertising being to induce the said victims to open up correspondence with the defendants and said corporation, in order that the stock of said corporation might be sold to them in the manner and upon the terms and conditions aforesaid:

That the defendants intended to and did, as a further part of said scheme and artifice to defraud, during the years 1918 and 1919, the exact dates being to the Grand Jurors unknown, enter into pretended agreements with pretended subscribers for large blocks of the capital stock of said corporation, who would be persons of small or no financial worth and unable to purchase or pay for the stock so to be subscribed for by them, which said agreements would purport to show that the said pretended subscribers or purchasers of stock were to pay the par value thereof to the said corporation, the intent and purpose of the defendants being thereby to make it appear that such large blocks of the capital stock of said corporation had been sold to the said pretended purchasers, and to pay themselves, through said Baine and Taylor, large commissions out of the funds and property of said corporation for the pretended sale of said stock, when in truth and in fact, the defendants had agreed with such pretended subscribers that they would not be required to pay for or purchase the stock so subscribed for, and that they would not be called upon to pay any notes to be given therefor by them for such stock, but would receive a small quantity of stock of the said corporation for signing such stock subscriptions, which they would not be required to pay for, the object of the defendants being that said stock would be resold at One Hundred Twenty-five Dollars (\$125) or more per share, and that all money, bonds, notes and other things of value received and to be received upon the said stock so to be sold, in excess of the par value thereof, would be divided among the defendants and by them appropriated to their own personal use and not for the use or benefit of the said corporation; that the stock so to be resold under this said arrangement and scheme was to be and was subscribed for by the victims on the regular subscription blanks of said corporation, and was to be and was represented by the defendants to be treasury stock of the said corporation;

That the said defendants intended, as a further part of the said scheme and artifice, to and did subscribe for large blocks of the capital stock of said corporation, at the par value thereof, with the intention of not paying for the said stock so subscribed for by them, and with the intention of reselling such stock for a price or sum in excess of the par value thereof, to victims, and to appropriate to and

divide among themselves, all money, bonds, notes or other things of value that should be received in the resale of such stock in excess of the par value thereof; that the stock resold and to be resold [fol. 23] under this agreement was to be subscribed for on the regular subscription blanks of the said corporation and purport to be subscriptions for stock of said corporation, and was to be and was represented to the said victims as the treasury stock of the corporation.

That the said defendants intended to and did, as a further part of said scheme and artifice to defraud, pay dividends out of the proceeds of the sale of capital stock and out of funds of said corporation not earned by it as profits from the operation of its business, of seven per cent (7%) on preferred capital stock of said corporation at the expiration of one year after such stock was paid for by the said victims who purchased the same, and represented and pretended and caused it to be represented and pretended to the said victims that the dividends so paid had been earned by said corporation and were the legitimate profits earned in the business of the said corporation, and the defendants issued and sent out and caused to be issued and sent out by mail, to the said victims, a form of dividend letter representing to and assuring the said victims that the said dividends so being paid were earned by and as the legitimate profits of said corporation, the object and intent of the defendants in sending out said letters in connection with the said dividends being to represent to and reassure the said victims that the said corporation was earning profits out of which dividends could legitimately be paid, and of the integrity and efficiency of the management and operation of the said corporation and with the intention of assisting the said Taylor and the stock salesmen and agents employed by him in the sale of the stock of the said corporation, to sell more of the said stock to the said victim, and that soon after the payment of such dividends the said victims would be called on by the said Taylor and his stock salesmen and agents employed by him in sale of the stock of said corporation and be solicited to purchase additional stock in the said corporation, on the faith of such dividends, it being further intended by the defendants that the said Taylor and his said stock salesmen and agents would represent to such victims that the stock of said corporation was valuable and was paying legitimate dividends of seven per cent (7%) per annum and would soon pay as high as forty per cent (40%) per annum:

That the defendants intended, as a further part of the said scheme and artifice to defraud, to represent and pretend to the said South Dakota State Securities Commission and others to the Grand Jurors unknown, for the purpose of deceiving and defrauding the said victims, and did with that intent and purpose, on or about the 8th day of April, 1919, and on or about the 22nd day of November, 1919, and at other times the exact dates being to the Grand Jurors unknown, make and cause to be made and sent to the said South Dakota State Securities Commission, through the United States mail, certain letters and documents, in and by which it was stated and rep-

resented, among other things, that every dollar's worth of material purchased by the plant of said corporation had been paid for in cash, that the plant would be operated for the making of legitimate profits, that dividends would be paid from the earnings, that the plant would be clear of encumbrance and would be kept so for the protection of thousands of investors in their preferred stock, that the said corporation was paying a guaranteed seven per cent (7%) dividend upon its stock out of the funds from profits derived from the purchase of products of other packers and the resale of the same, such statements and representations being so made for the purpose of inducing said South Dakota State Securities Commission to continue in force the authority theretofore granted by it to the said corporation to sell its [fol. 24] capital stock within the State of South Dakota, and thus enable the defendants to cause the capital stock of said corporation to be sold to the said victims within the said State of South Dakota;

That each and all of the aforesaid statements, representations and promises, as the defendants and each of them then and there well knew, would be and were false and fraudulent, and defendants did not, when said promises and representations were made, intend to carry out or perform the same and well knew that said corporation could not and would not carry out or perform the same, and the said defendants intended thereby to deceive and defraud the said corporation, and the said victims, and to induce the said victims to part with their money and property in the purchase of the said capital stock of the said corporation and in the subscriptions so obtained and to be obtained from the said victims for the said capital stock in said corporation, in the manner and by the means aforesaid.

And the said defendants, so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 1st day of April, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail by the postoffice establishment of the United States according to the direction thereon, at the town of Viborg and within the Division and District aforesaid, and within the jurisdiction of this court, a certain letter, dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. Martin Christiansen, Viborg, S. D., R. No. 2, Box 74, and which said envelope then — there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 31st day of March, 1920, placed and caused to be placed in the mails of the United States with an uncanceled two (2) cent postage stamp thereon, at the City of Sioux City, in the State of Iowa, for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Martin Christiansen, one of the said victims, and

the person to whom it was directed, according to the directions thereon, at the town of Viborg, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the postoffice establishment of the United States according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

[fol. 25]

Count 1

Midland Packing Company

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

March 31st, 1920.

Mr. Martin Christiansen, Viborg, S. D.

DEAR MT. CHRISTIANSEN:

We have your favor of March 30th, and are very much pleased that you wrote us because the rumors which have reached you are entirely false.

The Midland Packing Company is not now in the hands of the receiver, has not been, and there is no possibility of it so being. We have neither sold to Swift & Co., have no such move in contemplation, and the attitude we have taken in connection with not killing for the past ten days has been based upon our judgment that no profits could be made by so doing.

It is unfortunate that we are compelled to follow our judgment in these matters rather than listen to the idle gossip of people who do not have any money invested. The financial condition of the Midland Packing Company has never been in as favorable a condition as it now is, and my warm personal regard for you is such that if I felt the slightest cause for alarm, I should advise you, and I am sure that if the people who gave the rumors would take as much time to investigate as they do to believe, they would find that it comes from the mouths of people whose judgment either financially or on a business question is of no value. Any statements made are of such a character that they are only made with a view of hurting us, and as I said before, without reference to how it may seem to outsiders, we shall be compelled to conduct the business of the plant along the lines which we conceive will make the most profit to stockholders, and whether it pleases or displeases those who have no interest, we do not expect to conduct the business when there are no profits to be gained.

I should be glad to see you at any time personally at the plant, and go over matters fully with you.

With cordial personal regards, I remain,

Yours very truly, Midland Packing Company. B. I. Salinger, Jr., Vice-President.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

[fol. 26]

Count 2

And the Grand Jurors aforesaid, on their oaths aforesaid, further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph on page sixteen beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 5th day of February, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by registered mail, by the postoffice establishment of the United States, according to the direction thereon, at the town of Lyonville and within the Division and District aforesaid and within the jurisdiction of this court, a certain registered letter, dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. A. L. Will, Lyonville, via Kimball, S. D., and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Co., Sioux City, Iowa. Registered. C 2965, Register. Return Receipt Requested.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 4th day of February, 1920, placed and caused to be placed in the mails of the United States with uncanceled postage stamps of the denomination as follows: one (1) ten (10) cent and two (2) two (2) cent postage stamps thereon at the City of Sioux City in the State of Iowa for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said A. L. Will, one of the said victims, and the person to whom it was directed, according to the directions thereon, at the town of Lyonville, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the post office establishment of the United States according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

February 4th, 1920.

Mr. A. L. Will, Lyonville, Kimball, S. D.

DEAR SIR:

We are enclosing herewith stock certificate No. SD-85 for fifty shares of common stock, which you purchased from us, together [fol. 27] with a receipt for same which kindly sign and return to us in the stamped envelope attached.

As you no doubt know, the plant is now in operation and if you are in the city at any time, we trust we may have the pleasure of a visit from you and an opportunity of going over the entire project.

Very truly yours, Midland Packing Company. Fred C. Sawyer, President. FCS:HL.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 3

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count.

And the said defendants so having devised and intending to devise as aforesaid, a scheme and artifice to defraud, did, on or about the 9th day of April, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the town of Armour and within the division and District aforesaid, and within the jurisdiction of this court, a certain letter dated at Sioux

City, Iowa, and enclosed in an envelope and addressed and directed to Mr. Frank Groesbeck, Armour, South Dakota, and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 8th day of April, 1920, placed and caused to be placed in the mails of the United States with an uncanceled two (2) cent postage stamp thereon at the City of Sioux City, in the State of Iowa, for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Frank Groesbeck, one of the said victims, and the person to whom it was directed, according to the directions [fol. 28] thereon, at the town of Armour, State of South Dakota, and which said letter was thereupon delivered by mail by the post office establishment of the United States according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Midland Packing Co.

Capital \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

April 8th, 1920.

Mr. Frank Groesbeck, Armour, South Dakota.

DEAR MR. GROESBECK:

Your letter of recent date, in which you make inquiry concerning your dividend has been referred to me for answer.

The fact that your stock has now been issued for one year, is evidence of your early faith in our institution and your belief that after we have commenced operation, that substantial profits might be made upon the investment. Because of the vast amount of money required in the operation of our plant, which is now enjoying a prosperous trade, and the fact that all of our money was needed for that purpose, has caused the Board of Directors to pass a resolution which is as follows:

"Whereas, guaranteed dividends have been paid to such stockholders as have accumulated upon stock issued for the past several months, and

Whereas, the plant is practically completed and ready for commencement of operation, and for the purposes of handling the dividends in compliance with the fiscal years of the company; be it

Resolved, that further dividends be accrued up to July 1st, 1920, and that upon that date all dividends accrued upon stock issued to that date shall become due and payable and that thereafter all dividends earned and accrued shall be payable from the office of the Secretary quarterly of each fiscal year, and the Secretary is hereby directed by this resolution to arrange his books in conformity to this resolution and pay dividends in compliance with this resolution of the Board of Directors."

This has been passed for the purpose of enabling us to use all our funds for the purposes mentioned and as business men and investors, I am sure that you will agree with me that it will be unwise to borrow money for operation, when the use of the money we have will bring us greater rates and under this rule all dividends will be paid quarterly and such dividends as may be due at this time and are not paid will accrue to you and will be paid at the quarterly period provided by the resolution.

We trust that you will agree with us in the wisdom of this decision and we ask your patience and judgment of the work that we are doing, because we feel confident that the prospects, based upon the [fol. 29] splendid business we have been enjoying since operation, will fully justify this action.

Very truly yours, Midland Packing Company. C. H. Burlingame, Treasurer. CHB:R. R.

That at the time of causing said letter to be delivered by mail of the United States according to the direction thereon the said defendants then well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 4

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 2nd day of May, 1920, in and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do unlawfully, feloniously and knowingly, did cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the town of Viborg, and within the Division and District aforesaid and within the jurisdiction of this court, a certain letter, dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Martin Christiansen, Viborg,

S. D., and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 1st day of May, 1920, placed and caused to be placed in the mails of the United States with an uncanceled two (2) cent postage stamp thereon, at the City of Sioux City, in the State of Iowa, for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Martin Christiansen, one of the said victims and the person to whom it was directed, according to the directions thereon, at the town of Viborg, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the post office establishment of the United States, according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

[fol. 30]

Midland Packing Company

Midland Packing Co.

Capital \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

April 30th, 1920.

To all Stockholders:

We are enclosing the editorial page of the Sioux City Tribune for April 29th, 1920, calling your attention to the marked editorial. The saneness and candor of the views therein expressed, we believe, are beyond question. No bias or prejudice colors the statements and the writer merely voices his opinion of the sensible attitude that should be adopted by the stockholder.

In a business sense, the Midland Packing Company is a co-partnership, in which every stockholder is a partner. The future welfare of the Company and its reputation is a matter of vital concern to each subscriber to stock.

View the situation calmly. If you have matters that need adjustment, come to the stockholders' meeting that will be held in the near future and make known your troubles. If you have suspicions arising from the many false and malicious rumors, arrange at that time for an investigation. As a business proposition and in fairness to yourselves and the Company, try to preserve rather than destroy that which is yours.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 5

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege, and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 28th day of April, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause [fol. 31] to be delivered by mail, by the post office establishment of the United States, according to the directions thereon, at the town of Platte, and within the Division and District aforesaid, and within the jurisdiction of this court, a certain letter dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. Thos. Mansheim, Platte, S. D., and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 27th day of April, 1920, placed and caused to be placed in the mails of the United States, with two (2) uncanceled two (2) cent postage stamps thereon, at the City of Sioux City, in the State of Iowa, for mailing and delivery with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Thos. Mansheim, one of the said victims and the person to whom it was directed, according to the directions thereon, at the town of Platte, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the postoffice establishment of the United States according to the directions thereon, which said letter was as follows, (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company, Sioux City, Iowa

Plant correspondence.

April 27th, 1920.

To all stockholders:

We take pleasure in enclosing a pamphlet which contains the by-laws of the Midland Packing Company. This pamphlet gives you information as to how the officers are elected, their powers and duties, how and when directors are elected, their terms of office, when and where meetings are held, as well as facts regarding the stock, its voting power and information regarding dividends and manner in which finances are handled.

We are also enclosing a pamphlet issued by the Sioux City Chamber of Commerce, which contains information and statistics about the different industries in and around Sioux City.

We call your special attention to the several references made to the Midland Packing Company, which will give you an idea what the business men of Sioux City think about the Midland Packing Company, in which you have invested your money. By special request the Chamber of Commerce have favored us by furnishing enough pamphlets to send one to each stockholder.

Both these pamphlets should be read very carefully, as they contain valuable information regarding the gigantic house in which you are financially interested, and its success depends greatly upon the co-operation of its stockholders.

Yours very truly, Midland Packing Company.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose [fol. 32] of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 6

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby re-affirm, re-allege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did on or about the 21st day of June, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice, and attempting so to do, unlawfully, feloniously and knowingly, did

cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the town of Bridgewater, State of South Dakota, and within Division and District aforesaid, and within the jurisdiction of this court, a certain letter, to-wit: a letter directed to Mr. W. J. Shanard, Bridgewater, S. D., which said defendants then lately before, to-wit: on or about June 21st, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said W. J. Shanard at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company, Packers, Sioux City, Iowa

Midland Packing Co.

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Pres. & Genl. Counsel; C. H. Burlingame, Secretary & Treasurer.

June 21, 1919.

Mr. W. J. Shanard, Bridgewater, S. D.

DEAR SIR:

Your ten shares of preferred stock purchased on the 21st day of June, 1918, entitled you to the 7% guaranteed dividend due and payable on the 21st day of June, 1919.

We are pleased to advise you that we have been fortunate enough to make sufficient legitimate profits to be able to pay you the dividend at this time, and we are enclosing you herewith check for \$70. of which kindly acknowledge receipt.

You were among the first purchasers of stock in the project, and despite war and labor conditions we hope to have the plant complete and running within less than a year's time from the commencement of actual building, an unprecedented accomplishment, we think, and we feel that the structure which is now nearing completion will be one of the finest packing houses in the Middle West. [fol. 33] We express the hope that you will call upon us when you are in Sioux City, and look over the investment, and we feel that if you do so you will feel the investment is one which has been justified, and that in the future you may hope for substantial returns upon your investment.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS:t.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 7

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did on or about the 24th day of October, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Viborg, State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this court, a certain letter directed to Mr. Martin Christiansen, Viborg, S. D., which said defendants then lately before, to-wit: on October 23, 1919, placed and caused to be placed in the post office of the United States at Sioux City, Iowa, for delivery by the post office establishment of the United States to said Martin Christiansen at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame,
Secretary and Treasurer, Sioux City, Iowa, U. S. A.

October 23rd, 1919.

Mr. Martin Christiansen, Viborg, S. D.

DEAR SIR:

Referring to your sale of October 22nd, Mr. Spellings and Mr. Colby have advised us of this sale and of their promises made to you in connection with its resale, and this is to advise you that the company has been informed and thoroughly understands their [fol. 34] promises to you and that your note will not be sold or negotiated or used as collateral pending its life.

Very truly yours, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. BIS-t.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defend-

ants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 8

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 5th day of November, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail, by the postoffice establishment of the United States, according to the direction thereon, at the town of Centerville, State of South Dakota, and within the Division and District aforesaid and within the jurisdiction of this court, a certain letter, to-wit: a letter directed to Mr. P. C. Peterson, Centerville, S. D., which said defendants then lately before, to-wit, on November 4th, 1919, placed and caused to be placed in the post office of the United States at Sioux City, Iowa, for delivery by the post office establishment of the United States to said P. C. Peterson at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

November 4th, 1919.

Mr. P. C. Peterson, Centerville, S. D.

DEAR SIR:

Messrs. Colby and Spellings have advised us of their arrangements with you, which we thoroughly understand. You may be assured that they will carry out their contract.

Yours very truly, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. BIS-t.

[fol. 35] That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 9

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment except these allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did on or about the 12th day of June, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail, by the postoffice establishment of the United States, according to the direction thereon, at the town of Vermilion, State of South Dakota, and within the division and District aforesaid, and within the jurisdiction of this court, a certain letter, to-wit: a letter directed to Mr. Theo. Anker, Vermilion, S. D., which said defendants then lately before, to-wit: on June 11, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said Theo. Anker, at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letter-head thereof), to-wit:

Midland Packing Company, Packers, Sioux City, Iowa

Midland Packing Co.

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Pres. & Genl. Counsel; C. H. Burlingame, Secretary & Treasurer.

June 11th, 1919.

Mr. Theo. Anker, Vermilion, S. D.

DEAR MR. ANKER:

Your twenty-five shares of preferred stock purchased on the eleventh day of June, 1918, entitle you to the 7% guaranteed dividend, due and payable on the eleventh day of June, 1919.

We are pleased to advise you that we have been fortunate enough to make sufficient legitimate profits to be able to pay you the divi-

dend at this time, and we are enclosing herewith check for \$175.00, for which kindly acknowledge receipt.

You were among the first purchasers of stock in the project, and despite war and labor conditions, we hope to have the plant complete and running within less than a year's time from the commencement of actual building, an unprecedented accomplishment, we think, and [fol. 36] we feel that the structure which is now nearing completion will be one of the finest packing houses in the Middle West. We express the hope that you will call upon us when in Sioux City and we feel that if you do so you will feel the investment is one which has been justified, and that in the future you may hope for substantial returns upon your investment.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS/MP.

that at the time of the placing and causing to be placed in the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 10

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 23rd day of August, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice, and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail, by the post office establishment of the United States, according to the direction thereon, at the town of Springfield, State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to wit: a letter directed to Mr. Will Hartman, Springfield, S. D., which said defendants then lately before, to wit: on August 22nd, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said Will Hartman at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & General Counsel; C. E. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

August 22nd, 1919.

Mr. Will Hartman, Springfield, S. D.

DEAR MR. HARTMAN:

We enclose you herewith stock certificate, representing the stock which you recently purchased, together with a receipt for same, which kindly sign and return in the enclosed stamped envelope at your convenience.

[fol. 37] We are very glad indeed to number you among our stockholders, and we appreciate the assistance you have rendered our representative. We are pleased to advise you that the progress of the plant at this time is very gratifying to the officers of the Company, and we trust that if you are at any time in Sioux City we may have the pleasure of a visit with you, and an opportunity of going over the entire project.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS/MP.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 11

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 25th day of October, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Kimball, State of South Dakota, and within the Division and District aforesaid,

and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. A. L. Will, Kimball, S. D., which said defendants then lately before, to-wit: on October 24th, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said A. L. Will at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary and Treasurer, Sioux City, Iowa, U. S. A.

October 24th, 1919.

Mr. A. L. Will, Kimball, S. D.

DEAR SIR:

We thank you for your prompt attention to the renewal of your note and acknowledge receipt of check for \$225.00 interest.

[fol. 38] We enclose herewith your cancelled note and wish to assure you of our sincere appreciation of the confidence you have shown in our project. The plant is practically ready for operation and we feel that the future of the business is assured.

Yours very truly, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. PLV/Mc.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 12

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 7th day of January, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the

intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Armour, State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. Ardie C. Jensen, Armour, S. D., which said defendants then lately before, to-wit: on January 6th, 1920, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said Ardie C. Jensen at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

January 6, 1920.

Mr. Ardie C. Jensen, Armour, S. D.

DEAR SIR:

Your note for \$1,000 will be due January 15th, with interest at [fol. 39] 6% from date. If you will advise us to what bank you wish your note sent for collection same will be promptly sent.

Yours very truly, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. BIS-t.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 13

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 13th day of January, 1920, in and for executing said scheme and

artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon at the town of Viborg, S. D., and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. P. L. Peterson, Mr. Alfred Christianson, c/o H. E. Monk, Viborg, S. D., which said defendants then lately before, to-wit: on January 12th, 1920, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said P. L. Peterson and Mr. Alfred Christianson at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr. Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

January 12th, 1920.

Mr. P. L. Peterson, Mr. Alfred Christianson, c/o H. E. Monk, Viborg, S. D.

GENTLEMEN:

Mr. Colby has called to our attention the contract which he has entered into with you, and this letter is written to advise you that [fol. 40] the company is fully aware of the contract entered into and of the conditions of Mr. Colby's agreement with you.

Yours very truly, Midland Packing Company. B. I. Salinger, Jr., Vice President and General Counsel. T. BIS-t.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 14

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment.

ment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about June 21st, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Alcester, State of South Dakota, and within the division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. W. M. Rowley, Alcester, S. D., which said defendants then lately before, to-wit: on June 20th, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said W. M. Rowley at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company, Packers, Sioux City, Iowa

Midland Packing Co.

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & Genl. Counsel; C. H. Burlingame, Secretary & Treasurer.

June 20th, 1919.

Mr. W. M. Rowley, Alcester, S. D.,

DEAR SIR:

Your twenty shares of preferred stock purchased on the 24th day of June, 1918, entitle you to the 7% guaranteed dividend due and payable on the 24th day of June, 1919.

[fol. 41] We are pleased to advise you that we have been fortunate enough to make sufficient legitimate profits to be able to pay you the dividend at this time, and we are enclosing you herewith check for \$140.00, of which kindly acknowledge receipt.

You were among the first purchasers of stock in the project, and despite war and labor conditions we hope to have the plant complete and running within less than a year's time from the commencement of actual building, an unprecedented accomplishment, we think, and we feel that the structure which is now nearing completion will be one of the finest packing houses in the Middle West. We express the hope that you will call upon us when in Sioux City, and look over your investment, and we feel that if you do so you will feel the investment is one which has been justified, and that in the future you may hope for substantial returns upon your investment.

Yours very truly, Midland Packing Company, Fred C. Sawyer, President. FCS-t.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

S. Wesley Clark, United States Attorney for the District of South Dakota.

Names of witnesses sworn and examined before the Grand Jurors: Paul Miller, John P. Denahy, Humphrey Statter, R. M. Stokes, W. J. Shannard, Eunice McLaughlin, Mae Paulson, Martin Christenson, H. B. Martin, Mrs. Bob Thayer, W. Hughes.

No. 983 W. D.—United States District Court, District of So. Dak., Western Division.—The United States of America vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., Defendants.—Indictment Vol. Secl. 215 Penal Code—using the mails to defraud.—A true bill, Samuel W. Huntington, Foreman.—Filed in open Court this 20th day of May, A. D. 1922, Jerry Carleton, Clerk.

[fol. 42]

DEFENDANT'S EXHIBIT B

Motion for Transfer to District of South Dakota, Filed May 2, 1923

M-356-7

7. Application for Order of Transfer

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

No. 983, W. D.

THE UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Motion to Transfer—Filed Oct. 17, 1922

Comes now S. W. Clark, the United States Attorney for the District of South Dakota, and respectfully shows unto the Court that the indictment in the above entitled cause was returned by a Grand Jury of the United States drawn from the body of the District at a Session of this Court held at the City of Deadwood, Lawrence County, South Dakota, within the Western Division, beginning on the third Tuesday in May, 1922; but that by the recitals in said indictment it appears that the acts complained of were committed within the Southern Division of the District of South Dakota, and

that the trial and all further proceedings herein should be and — within the Southern Division of this District, and by reason thereof application is now made for an order of the Court transferring said cause from the Western Division of the District of South Dakota, to the Southern Division of said District, for all further proceedings herein.

Presented in open Court at Sioux Falls, South Dakota, this 17th day of October A. D. 1922.

(Signed) S. W. Clark, United States Attorney for the District of South Dakota.

[fol. 43] [File endorsement omitted.]

UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Sioux Falls, in said District this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk. (Seal of U. S. District Court, Dist. of South Dakota.)

DEFENDANT'S EXHIBIT B—Continued

UNITED STATES OF AMERICA,
District of South Dakota, ss:

JUDGE'S CERTIFICATE TO CLERK

I, James D. Elliott, Judge of the District — of the United States within and for the District aforementioned the same being a Court of Record, within and for the District aforesaid, do hereby certify, that Jerry Carleton, is Clerk of said Court, and was such Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk — in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D. 1922.

(Signed) Jas. D. Elliott, Judge of the District Court of the United States for the District of *of* South Dakota. (Seal of District Court of the United States for the District of South Dakota.)

[fol. 44] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE TO JUDGE

I, Jerry Carleton, Clerk of the District Court of the United States of America within and for the District aforesaid, do hereby certify, that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District Court of South Dakota. (Seal of the U. S. District Court, District of South Dakota.)

[Title omitted]

[fol. 45] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States, for the Southern District of New York do hereby Certify that the writings annexed to this Certificate, namely Motion for transfer to District of South Dakota, filed December 27, 1922, in the case entitled: The United States of America vs. B. I. Salinger, Jr., et al., M-7-356, have been compared by me with their originals on file and remaining of record in my office; that they are corrects transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this twenty-eighth day of March, in the year of our Lord One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

Alex Gilchrist, Jr., Clerk.

[fol. 46] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF
LOUISIANA

No. 17233

[Title omitted]

REPORT OF HEARING APRIL 20, 1923—Filed May 2, 1923

Proceedings had in the above entitled and numbered matter on hearing in open court before the Hon. Rufus E. Foster, Judge, on the 20th day of April, 1923

Appearances: St. Clair Adams, Esq., Attorney for the Petitioner; Louis P. Bryant, Esq., U. S. Asst. District Attorney, and S. W. Clark, Esq., District Attorney for the District of South Dakota, Representing the Respondent.

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Mr. Bryant: The Government presents a motion praying for order for removal of B. I. Salinger, Jr., and submits herewith motion and order, together with commitment attached.

[fol. 47] We file also the return of the Marshal in the proceeding No. 17,233, entitled B. I. Salinger vs. Victor Loisel, and also the return of the Marshal in the proceeding No. 17,238, entitled B. I. Salinger Jr., versus Victor Loisel, also in response to writ of Certiorari, directed to United States Commissioner A. H. Browne.

Offer

Mr. Adams: Counsel for the relator offers in evidence certified copy of the indictment described in the writ, and, secondly, certified copy of an application for order of transfer to the District Court of the United States for the District of South Dakota, Western Division.

FRED C. SAWYER, sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. Fred C. Sawyer.

Q. What is your business?

A. Manufacturer's agent.

Q. What is your address?

A. 1814 Mission Street, South Pasadena, California.

Q. Do you know Mr. C. H. Burlingame?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the Mr. Sawyer who is jointly indicted in the District Court of the United States for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1st, 1919, and May 10, 1920?

A. I was not in Dakota during that period.

Q. You were not in South Dakota during that period of time?

A. No sir.

[fol. 48] No cross-examination.

C. H. BURLINGAME, sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. C. H. Burlingame.

Q. What is your business?

A. I am employed by the California Bank, Los Angeles, in the position of manager.

Q. Do you know Mr. Fred C. Sawyer?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the C. H. Burlingame who is jointly indicted with these gentlemen in the District of South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the state of South Dakota between June 1st, 1919, and May 10, 1920?

A. Not at all.

No cross-examination.

B. I. SALINGER, Jr., sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. B. I. Salinger, Jr.

Q. You are the petitioner in these proceedings for a writ of habeas corpus, are you not?

A. I am.

Q. Where is your home, in what state is it located?

A. My home is in Sioux City, Iowa.

Q. Do you know Mr. C. H. Burlingame and Mr. Fred C. Sawyer who were just on the stand?

A. I do.

[fol. 49] Q. Are you the same B. I. Salinger, Jr., who is jointly indicted with those gentlemen in the United States District Court for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1, 1919 and May 10, 1920?

A. None at all.

No cross-examination.

Mr. Adams: I suggest that we make the following agreement:

It is agreed that the testimony already taken on the present petition for writ of habeas corpus shall be used in the other case, No. 17,233, just as if the same were actually taken in that case, it being further understood, however, that this agreement shall not be considered to be a consolidation of the two cases. It is furthermore agreed that the testimony referred to above shall also be used and deemed to have been taken in the application of the *of the* government for warrant of removal.

Mr. Clark: It being understood, however, that the said removal proceedings are separate and distinct from the habeas corpus proceedings.

Mr. Adams: I can't make that agreement.

Testimony for the Government

T. I. GALBREATH, sworn and examined as a witness on behalf of the respondent, testified as follows:

Direct examination.

[fol. 50] By Mr. Bryant:

Q. What is your name?

A. T. I. Galbreath.

Q. You are United States Deputy Marshal here, are you not?

A. Yes, sir.

Q. Did you have occasion to see the plaintiff, Ben I. Salinger, Jr., on the 31st of March, 1923?

A. I don't remember the date, but it was on the date that Mr. Parsons brought him up to the Commissioner's office whatever date that was.

Q. State the circumstances in detail of this presentation of Salinger?

A. I answered a phone call this morning—

Objection

Mr. Adams: I object to this testimony. I can't see what probative value it can possibly have.

The Court: Whom did you receive the phone call from?

The Witness: The Clerk's office.

The Court: Well, omit all that. Just tell what took place when Salinger and Parsons came.

Q. Go ahead.

A. Well, Mr. Parsons came into the office with him, and I turned from my desk just as Mr. Parsons had spoken to some deputy in the office—

Objection

Mr. Adams: I object to anything he said to any deputy in the office.

A. —and I walked out and saluted Mr. Parsons as he was leaving the office, Mr. Salinger was left in the office in charge of—well, I really took Mr. Salinger in charge—he stayed in there a little while and brought him into the private office, into the office where I was working, to keep him from being interviewed or addressed by the newspaper people.

[fol. 51] Q. Well now, what if anything was said to you by Parsons on that occasion?

Objection

Mr. Adams: I object, if your Honor please. How can we be bound by anything the counsel for the surety company did?

The Court: Anything Mr. Parsons said in the presence of Mr. Salinger is admissible.

Cross-examination.

By Mr. Adams:

Q. As a matter of fact, you did have Mr. Salinger in custody, when he was detained in the private office of the Marshal, did you not?

A. Oh yes.

Q. Absolutely no doubt about that, is there?

A. We had him in there all right.

Q. And, further, there is no doubt about the fact you didn't release him until the habeas corpus was served?

A. No sir, I didn't.

Q. And until you saw a bond that had been approved by the United States District Judge?

A. Yes Sir.

Q. As a matter of fact, you came down to the Clerk's office and you examined yourself that bond before you permitted Mr. Salinger to leave your custody, did you not?

A. Not only examined the bond but read the order of the Court, and then I went to satisfy myself that that order of court had been strictly complied with before I let Mr. Salinger go.

Q. Prior to your being satisfied with this bond, you detained him under arrest, did you not and in your custody?

[fol. 52] A. Well, from the first time we got sight of Mr. Salinger, why, in view of the fact that the office had been in communication with the United States Marshal and the United States District Attorney from Sioux Falls, why we would have kept Mr. Salinger.

Q. Like any other person?

A. We certainly would.

Q. And you did have him under detention until the writ of habeas corpus was allowed by the court and bond given, didn't you?

A. Yes sir.

By Mr. Bryant:

Q. When Salinger walked into the office, had you ever seen him before?

A. How is that?

Q. When Salinger then walked into the Marshal's office on the first occasion, had you ever seen him before?

A. No sir.

Q. Had you ever heard of Salinger before that first day that he was in your office, surrendered by Parsons?

Objection

Mr. Adams: I object to that "surrendered by Parsons."

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Objection

Mr. Adams: I object to the whole question on the ground that there is nothing in your return or from what this witness has said to indicate that Salinger was surrendered to the Marshal.

Q. Did you ever see him before?

A. No sir.

A. Did you ever hear of him before? I am referring to this occasion that Salinger came into the office.

A. I don't think I ever heard of him before.

[fol. 53] Q. When was it you heard from the United States Attorney's office in Sioux City?

A. I would have to see that telegram to answer.

The Court: That has nothing to do with the case.

Offer

Mr. Clark: We offer in evidence bond, certified copy of bond given by B. I. Salinger, Jr., to the District Court of the United States for the District of South Dakota, at Des Moines, Iowa, on the 13th day of June, 1922, certified to by the clerk of the district court for the District of South Dakota.

Objection

Mr. Adams: Objected to on the ground it is foreign to any issue involved in these proceedings, and irrelevant.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of the record before the Circuit Court of Appeals for the Second Judicial Circuit of the United States, certified to by the Clerk of that Court.

Objection

Mr. Adams: Objected to on the ground it is foreign to the issues of this case, and is irrelevant and *res inter alios acta* and without probative value here, because there can be no *res judicata* in matters of habeas corpus, the petitioner having the right to apply to any judge for such writ, whether he has been denied that right on previous occasions by another judge or not.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of an order of the District Court of the United States for the Southern District of [fol. 54] New York, in the matter of B. I. Salinger, Jr., petitioner for habeas corpus, showing proceedings had in that regard on the 16th day of March, 1923.

Objection

Mr. Adams: We make the same objection to that offer that we did to the entire record in the New York case, just as if we restated that objection here.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence a certified copy transcript from the minutes of the District Court of the United States for the Southern District of New York, showing proceedings had in the matter of the removal of B. I. Salinger, Jr., from the Southern District of New York to the District of South Dakota, of date March 20, 1923.

Objection

Mr. Adams: Objected to on the same ground.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of a bond given by B. S. Salinger, Jr., under the order of the District Court of the Southern District of New York, of date March 20, 1923, and conditioned for his appearance before the United States Court for the District of South Dakota for trial at the opening day of April, 1923 term.

Objection

Mr. Adams: Same objection, just as if restated.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the record of the District Court of the United States for the District of South Dakota [fol. 55] in the matter of the United States vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., showing proceedings had in that court in that cause on the 3rd and 4th days of April, 1923, and consisting of motion for forfeiture of the bond and issuance of bench warrants and the allowance thereof by the Court.

Objection

Mr. Adams: We object on the same ground. It is totally irrelevant to any issues here what transpired in the District of South Dakota when we were down here;

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the bench warrant referred to in the minutes of of the Court for the District of

South Dakota last received in evidence and which is attached to the Commissioner's return.

Objection

Mr. Adams: Same objection.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the indictment referred to in the Commissioner's return to this court under the writ of certiorari and annexed thereto.

Mr. Adams: We have no objection to that, inasmuch as we have offered it ourselves.

Mr. Burns: Evidence closed on both sides.

[fol. 56] U. S. DISTRICT COURT, EASTERN DIST. OF LOUISIANA,
NEW ORLEANS DIVISION

No. 17233

[Title omitted]

PRÆCIPE FOR APPELLEE—Filed May 21, 1923

To the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division.

SIR:

You will please incorporate in the transcript of appeal to the Supreme Court of the United States in the above numbered and entitled cause, the following:

(1) Transcript of Record, United States Circuit Court of Appeals for the Second Circuit;

(2) Bond given before the Clerk of the District Court of the United States for the Southern District of New York;

(3) Certified copy of Order of United States District Court for the Southern District of New York;

(4) Minutes of proceedings had in the United States Court for the District of South Dakota on April 23rd, 1923;

(5) Bench warrant issued under seal of the United States District Court for the District of South Dakota.

Respectfully, For the U. S. Atty., (Signed) L. P. Bryant, Jr.,
Assistant U. S. Attorney.

[fol. 57] EXHIBIT IN EVIDENCE: TRANSCRIPT OF RECORD, UNITED STATES CIRCUIT COURT, SECOND CIRCUIT—Filed April 20, 1923

UNITED STATES CIRCUIT COURT FOR THE SECOND CIRCUIT

In the Matter of B. I. SALINGER, JR.

Appeal from Order Dismissing Writs of Habeas Corpus and Certiorari

Transcript of Record

Gilbert, Campbell & Barranco, Attorneys for Petitioner-Appellant,
No. 14 Wall Street, New York City.

William Hayward, U. S. Attorney, Attorney for Respondent, P. O.
Building, New York City.

The Court Press, 47 West Street, Bowling Green, 2820.

U. S. District Court, Eastern District of Louisiana, New Orleans
Division. Filed Apr. 20, 1923. (Signed) H. J. Carter, Clerk.

[fols. 58 & 59] Index omitted in printing.

[fol. 60]

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the
District Court of the United States for the Southern District of
New York, Greeting:

Because in the order, as also in the rendition of the judgment of a
plea which is in the District Court, before you, or some of you, be-
tween the United States of America, complainant, and B. I. Salinger,
Jr., defendant, a manifest error hath happened to the great damage
of the said B. I. Salinger, Jr., as is said and appears by his complaint,
We being willing that such error, if any hath been, should be duly
corrected, and full and speedy justice done to the Parties aforesaid
in this behalf, Do command You, if judgment be therein given, that
then under your seal distinctly and openly, you send the record and
proceedings aforesaid with all things concerning the same, to the
Judges of the United States Circuit Court of Appeals for the Second
Circuit at the City of New York, together with this writ, so that
you have the same at the said place, before the Judges aforesaid, on
the 13th day December, 1922, with the order and proceedings
aforesaid being inspected, the said Judges of the United States
Circuit Court of Appeals, for the Second Circuit may cause further
to be done therein to correct that error what of right and according
to the law and custom of the United States ought to be done.

[fol. 61] Witness the Honorable William H. Taft, Chief Justice of the United States, this 11th day of December, in the year of Our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-seventh.

Alex Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. J. W. Mack, U. S. District Judge. (Seal.)

[fol. 62] At a Criminal Term of the United States District Court Held in and for the Southern District of New York, at the Court-house Thereof, in the Borough of Manhattan, New York City, on the 11th Day of December, 1922.

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS
AND TO FILE PRINTED RECORD

A motion having been made by the petitioner B. I. Salinger, Jr., on the 11th day of December, 1922, for an order extending the time of the said petitioner to settle and file a bill of exceptions herein to and including the 13th day of January, 1923, and to extend the time of the said petitioner to file his printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit up to and including the said 13th day of January, 1923, and the said motion having duly come on before me to be heard on the said 11th day of December, 1922.

Now after hearing William P. McCool, of counsel for the Petitioner in support of said motion and Maxwell S. Mattuck, Assistant United States Attorney, in opposition thereto, and due deliberation having been had thereon, it is

[fol. 63] Ordered, that the time for the petitioner B. I. Salinger, Jr., to settle and file the bill of exceptions in the appeal herein be and the same hereby is extended ten days from the 12th day of December, 1922, to wit, up to and including the 22nd day of December, 1922; and it is further

Ordered, that the time of the petitioner B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeals, for the Second Circuit, be and the same hereby is extended ten days from December 13th, 1922, to wit, up to and including the 22nd day of December, 1922.

Jno. C. Knox, U. S. D. J.

[fol. 64] At a Criminal Term of the United States District Court Held in and for the Southern District of New York, at the Court-house Thereof, in the Borough of Manhattan, New York, City, on the 22nd Day of December, 1922.

Present: Hon. John C. Knox, Judge.

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS
AND TO FILE PRINTED RECORD

A motion having been duly made by petitioner, B. I. Salinger, Jr., on the 22nd day of December 1922 for an order extending the time of the said petitioner to settle and file bill of exceptions herein up to and including the 27th day of December, 1922, and extending the time of said petitioner to file the printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit up to and including the 27th day of December, 1922, and said motion having duly come on before me to be heard on the said 22nd day of December, 1922,

Now, therefore, after hearing William P. McCool, of counsel, for petitioner, in support of said motion, and Maxwell S. Mattuck, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, it is

[fol. 65] Ordered, that the time of petitioner B. I. Salinger, Jr., to settle and file the bill of exceptions in the appeal herein be and the same hereby is extended up to and including the 27th day of December, 1922: and it is further

Ordered, that the time of petitioner B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeal for the Second Circuit be and the same hereby is extended up to and including the 27th day of December, 1922.

Jno. C. Knox, U. S. D. J.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

BILL OF EXCEPTIONS

Be it remembered, that on the trial of this cause in this Court, at the November, A. D. 1922 term, the Honorable Julian W. Mack, Circuit Judge, presiding, the following proceedings were had and none others, to-wit:

[fol. 66] The petitioner, B. I. Salinger, Jr., presented to the Court writs of habeas corpus and certiorari, granted on the 8th day of November, 1922, together with his petition verified on the 8th day of November, 1922, upon which said writs were granted.

Return to the writ of habeas corpus was made by William C. Hecht, United States Marshal.

Return to the writ of certiorari was made by Hon. Samuel M. Hitchcock, United States Commissioner.

True copies of said writs, petition and returns are annexed hereto and made part of this Bill of exceptions.

A hearing was had before the Court thereon, on the 13th day of November, 1922.

No evidence was introduced upon said hearing.

Upon said hearing the Court granted petitioner's motion to amend all papers and proceedings herein so as to correct the spelling of the name of petitioner to "Salinger"; to which the Government took no exception.

The Court also granted petitioner's motion to amend the petition herein so as to allege that the indictment admitted in evidence by the Commissioner was wholly invalid and the Grand Jury had no power to return the same nor the Commissioner power to take any action founded thereon, for the further reason that said indictment was returned by a Grand Jury sitting for the Western Division of the District of South Dakota, whereas certain members of said Grand Jury did not reside within said Western Division but were [fol. 67] drawn from other Divisions of said District. The Government thereupon conceded that the said Grand Jury was in fact drawn from the entire District of South Dakota and not from the Western Division of said District alone, and took no exception to the granting of petitioner's said motion.

At the conclusion of the argument, petitioner requested an opportunity to present a written brief upon the questions raised by him, which application was denied by the Court; to which ruling the petitioner by his counsel, then and there duly excepted.

At the conclusion of the hearing the Court directed that the said writs of habeas Corpus and certiorari heretofore granted herein be dismissed and that the petitioner be remanded to the custody of William C. Hecht, United States Marshal for the Southern District of New York, pending his removal to the demanding District; to which ruling of the Court the petitioner by his counsel, then and there duly excepted, and then and there announced in open Court that he would appeal from such ruling and determination to the Circuit Court of Appeals for the Second Circuit and duly saved his exceptions.

The Court directed that a formal order be prepared and entered upon its decision dismissing said writs over the exception of petitioner to which ruling, and the entry of which order, the petitioner, by his counsel, then and there duly excepted. Pursuant to said direction of the Court said formal order was entered on the 15th day of November, 1922.

After the conclusion of said hearing and on November 14th 1922, William C. Hecht, United States Marshal, Presented to the Court a further return to the writ of habeas corpus, verified November 14th 1922.

[fol. 68] In furtherance of justice and that right may be done, the Said B. I. Salinger, Jr., petitioner, tenders and presents the foregoing (together with the documents and exhibits referred to herein and made part hereof) as his bill of exceptions to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made part of the record and the same is accordingly done, this 27th day of December, A. D. 1922.

By the Court: (Signed) Julian W. Mack, Judge.

[fol. 69] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

WRIT OF HABEAS CORPUS

The President of the United States to Honorable William C. Hecht, United States Marshal, Greeting:

We command you, That you have the body of B. I. Salinger, Jr., by you imprisoned and obtained, as it is said together with the time and cause of such imprisonment and detention by whatsoever name said B. I. Salinger, Jr., shall be called or charged before me or the Judge presiding at a Criminal Term of this Court to be held in and for the Southern District of New York at the Court House thereof, Old Post Office Building Borough of Manhattan, New York City, on the 13th day of November, 1922 at ten thirty o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning him, and have you then there this writ.

Witness, Honorable Learned Hand, a Judge of the District Court of the United States, the 8th day of November, one thousand nine hundred and twenty-two.

Alex Gilchrist, Clerk. (United States Seal of the Court of the Southern District.) Gilbert, Campbell & Barranco, Attorneys.

Writ allowed bond in the sum of \$10,000. J. W. M., C. J.

[fol. 70] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

WRIT OF CERTIORARI

The President of the United States to Hon. Samuel M. Hitchcock, a Commissioner of the United States, Greeting:

Commands you, that you certify fully and at large to United States District Court, Southern District of New York, Criminal Division, Criminal Term at the Court House thereof, Old Post Office Building, Manhattan, New York City, on the 13th day of November, 1922, at

10:30 A. M. the day and cause of the imprisonment of B. I. Salinger, Jr., by you detained; as is said by whatsoever name the said B. I. Salinger, Jr., shall be called or charged; and have you then this writ.

Witness Hon. Learned Hand, a Judge of the United States District Court, the 8th day of November 1922.

Alex. Gilchrist, Clerk. (Seal of the United States for Southern District Court.) Gilbert, Campbell & Barranco, Attorneys.

Writ allowed. J. W. M., C. J.

[fol. 71] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI

The petition of B. I. Salinger, Jr., of Sioux City, State of Iowa, respectfully shows to this Court:

That your petitioner is unjustly and unlawfully detained and restrained of his liberty by, and in the Custody of William C. Hecht, the Marshal of the Southern District of New York.

That your petitioner is not detained and restrained by virtue of any final judgment of any Court of competent jurisdiction of any State.

That to the best of the knowledge, information and belief of your petitioner the pretense for his detention is that said Marshal claims the right to hold said petitioner and imprison him by virtue of a certain Warrant of Commitment issued under the circumstances hereinafter related.

That your petitioner is and for many years has been a resident and citizen of the United States and of the State of Iowa.

[fol. 72] That on or about May 20, 1922, your petitioner is informed, the Grand Jury of the United States District Court, for the Western Division of the District of South Dakota returned to said Court a certain indictment wherein and whereby, the said Grand Jury charged that your petitioner and certain other parties named in said indictment were guilty of a violation of Section 215 of the Penal Code of the United States; that as the sole basis for said charge, as your petitioner is informed and believes it was alleged that said defendants had placed in the Post Office of the United States at Sioux City, Iowa, certain letters in consummation of a scheme and artifice to defraud certain persons denominated in said indictment as "the victims."

That on or about the 21st day of October, 1922, your petitioner was arrested by the Marshal of the Southern District of New York. That your deponent is informed and believes that he was arrested

pursuant to a warrant which had theretofore been issued by Hon. Samuel M. Hitchcock, United States Commissioner, upon the affidavit and complaint of Maxwell S. Mattuck, Esq., Assistant United States Attorney for the Southern District of New York said complaint charging in effect that your petitioner was under the indictment heretofore mentioned and was fugitive from justice.

That thereupon and on the same day, your petitioner was taken before the said United States Commissioner by said Marshal pursuant to said warrant, and then and there was admitted to bail in the sum of One Thousand (\$1,000) Dollars, and the matter set down for a hearing for the 8th day of November, 1922.

[fol. 73] That on said 8th day of November, 1922 a hearing was had before the said United States Commissioner, and the said Commissioner thereupon summarily found that there existed probable cause to believe that this petitioner was guilty of the charge against him, and thereupon the said Commissioner cancelled the bail of said petitioner and committed the said petitioner to the custody of the said Marshal with directions that said petitioner be imprisoned and detained by the said Marshal until a warrant should issue by a Judge of the Southern District of New York, directing the removal of your petitioner from said Southern District of New York to the District of South Dakota, and thereupon a Warrant of Commitment for said custody was issued by said United States Commissioner and placed in the hands of the said Marshal; that thereupon the said Marshal arrested your petitioner and placed him in custody and restrained him of his liberty and detained him, and does still so imprison and detain your petitioner.

That upon the said hearing had before the said Commissioner, the only evidence introduced against the said petitioner was the complaint of said Assistant United States Attorney Mattuck hereinbefore referred to together with a certified copy of the indictment returned in the United States District Court for the Western Division of the District of South Dakota. The identity of the person charged in the complaint and indictment with your petitioner was admitted.

That your petitioner duly objected to the admissibility of said complaint and indictment as evidence to show probable cause for believing the defendant guilty of any offense against the United States, and particularly of having committed any offense, and especially the offense charged, within the territorial limits of the Western Division of the District of South Dakota, or within any Division of the District of South Dakota, and your petitioner urged that said indictment and complaint upon its face failed to show or allege that any crime or offense had been committed by your petitioner and especially that any crime or offense had been committed within the territorial limits and jurisdiction of the District of South Dakota, or in any Division thereof, and particularly in the Western Division thereof, and particularly for the following reasons:

I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United

States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against [fol. 75] the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof and that therefor said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendment of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offense as may be found to be charged in the indictment is charged to have been committed at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now, for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly, to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

VII. Subjects to grounds "I, II, III, IV, V and VI" hereof petitioner further states that evidence presented before the said Grand Jury as to all the counts contained in said indictment except Counts

1, 4 and 6 thereof, was insufficient to sustain the indictment for the reasons among others, that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are endorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury there was [fol. 77] introduced and used certain books, and the legal custodian of said books although subpoenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII and VIII" hereof presents the affidavits of Charles H. Rathburn and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IX. That subject to grounds "I, II, III, IV, V and VI" hereof petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding.

X. Subject to grounds "I, II, III, IV, V and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together render it difficult to construe and almost unintelligible; and it so lacks certainty of averment that petitioner ought not to be compelled to respond thereto.

XI. Subject to all of the foregoing grounds the petitioner says that the indictment attempts to charge a scheme by means of fraudulent pretenses, representations and promises, and with the intent to [fol. 78] defraud, to obtain from the persons styled in the indictment as victims certain of their moneys and property by means of inducing them to part with their said property in exchange for shares of stock of the Midland Corporation; said indictment further attempts to charge that the defendants each and all including your petitioner used the Post Office establishment in the United States to transmit to said victims in alleged execution of said scheme the letters sent out in the indictment and petitioner avers that it appears on the face of said indictment that none of said letters was in execution of said alleged scheme, but that said letters showed on their face that when they were written they and each of them referred to

acts or things then completed and finished and executed, and therefore incapable of being further executed; and it appears on the face of the indictment that none of said letters made any effort to obtain anything from anyone, nor is it charged that anything was obtained from anyone.

XII. Subject to all of the foregoing grounds, petitioner further says that although the indictment charges nothing but a scheme by such fraudulent means and devices to obtain money and property, and that this was done with intent to defraud, still the indictment nowhere charges that if anything was obtained from said victims, nor does it contain anything to show that the shares of stock of the said Midland Corporation therein referred to were not of the fair and reasonable value of the consideration paid therefor, and particularly [fol. 79] fails to — that anyone whosever was in fact defrauded by your petitioner or by any of the defendants, whether by means of the said letters or otherwise.

Your petitioner further says that the said commissioner overruled his objections to which petitioner saved his exceptions, and your petitioner now urges the said objections to this Court in support of this petition for writs of habeas corpus and certiorari with the same force and effect as if herein again set forth at length, and urges that the ruling of said commissioner was erroneous.

Your petitioner further says that he offered evidence before said commissioner to prove that he was not guilty in fact of the matters and things charged in said complaint and indictment against him, and that there was no probable cause for believing him guilty of the charge, and also offered evidence to prove that the matters and things alleged in said complaint and indictment did not happen or occur or arise within the District of South Dakota, and particularly within the Western Division thereof, and that the said United States Court within said district had no jurisdiction of the offense; that said commissioner ruled that he could not receive such evidence and refused to hear or consider the same.

Your petitioner further says that the letters complained of concern the affairs of the Midland Packing Company, a corporation organized under the laws of Iowa, and having its plant, offices and records at Sioux City, Iowa, where the said letters are alleged to have been mailed; that a great majority of the stock was sold in Iowa; it is well known in said State that the money derived from the [fol. 80] sale of the stock was honestly administered. That is, your petitioner is informed and believes, prior to the time of the *of the* proceedings in South Dakota which culminated in the indictment now under review, the following matters set forth in said indictment were fully investigated first by the Post Office Authorities and later by the United States Attorney for the District of Iowa, for the Purpose of ascertaining if there existed probable cause to believe that a crime had been committed; that after such investigation had as aforesaid in Iowa the United States Attorney refused to present the Matter to the Grand Jury for the District of Iowa. That at the same time that the indictment was found in South Da-

kota, as your petitioner is informed and believes, the Grand Jury for the District of Iowa was in session at Sioux City, Iowa, for the hearing of presentments, and no presentment was made to said Grand Jury against your petitioner.

All of the witnesses who appeared before the Grand Jury in South Dakota, as your petitioner is informed and believes were brought into the said jurisdiction from Sioux City Iowa for the express purpose of testifying. The alleged indictment therefore was found in a wholly foreign jurisdiction far distant from the home City of your petitioner. That your petitioner was never in the State of South Dakota at the time that the acts complained of in the indictment are alleged to have been committed.

By reason of the foregoing your petitioner respectfully urges that he is unlawfully detained and restrained of his liberty, and he prays that writs of habeas corpus and certiorari may issue in his behalf, directed to the Marshal of the Southern District of New York. [fol. 81] requiring said Marshal to bring your petitioner before this Court forthwith and to discharge your petitioner from custody.

That no previous application for such writs has been made.

B. I. Salinger, Jr.

Affidavit of B. I. Salinger, Jr., to above paper omitted in printing.

[fol. 82]

EXHIBIT "A" TO PETITION

DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION, DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,
against

FRANCIS C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Affidavit of Charles L. Rathbun Annexed to Petition

DISTRICT OF SOUTH DAKOTA,
County of Brown:

STATE OF SOUTH DAKOTA, ss:

Charles L. Rathbun, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court and appeared and served thereon at said term of court during which term the above entitled case was presented to said grand jury. That he remembers that three young ladies whose names he does not now recollect, appeared and testified before said grand jury, stating that they were stenog-

raphers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out through the United States mail; that W. J. Shanard of Bridgewater, [fol. 83] South Dakota, appeared and testified in regard to a letter that he claimed to have received from defendants through the United States Mail; that Martin Christianson of Viborg, South Dakota, appeared and testified that he had received certain letters from the defendants through the United States mail at Viborg, South Dakota; that a post office inspector, I think by the name of Hughes, appeared and testified in regard to the letters which he produced and as I believe described in the indictment that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and as I believe documents from South Dakota State Securities Commission that said papers were not identified by any witness except said Hughes; that no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of my recollection now, no other recipients of letters described in the indictment testified before the grand jury except the two persons that I have mentioned, Mr. Christianson and Mr. Shanard; the post office inspector might have testified about the other letters described in the indictment but I am not positive as to each letter.

C. L. Rathbun.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public. (Notarial Seal.)

[fol. 84]

EXHIBIT B TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION,
DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Affidavit of Samuel W. Huntington

District of South Dakota

STATE OF SOUTH DAKOTA,
County of Brown, ss:

Samuel W. Huntington, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at

Deadwood in the May, 1922, term of Court and appeared and served thereon at said term of Court during which term the above entitled case was presented to the grand jury. That he remembers that three young ladies whose names he does not now recollect appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out through the United States Mail; that a party whose name is W. J. Shanard of Bridgewater, South Dakota, to the best recollection of affiant, ap-[fol. 85] peared and testified in regard to a letter which he claimed to have received from defendants through United States Mail; that a party whose name is Martin Christianson of Viborg, South Dakota, appeared and testified that he had received certain letters from defendants through United States mail at Viborg, South Dakota; that a post office inspector, affiant thinks by the name of Hughes appeared and testified in regard to letters which he produced and as affiant believes were described in the indictment that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and affiant believes that documents from the South Dakota States Securities Commission; that said papers were not identified by any witness except the aforesaid inspector whose name affiant recalls as Hughes; that to the best of affiant's Knowledge and belief no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of affiant's recollection now no other recipients of letters described in the indictment testified before the grand jury save the two persons mentioned Christianson and Shanard; that the post office inspector may have testified about the letters other than the two Christianson and Shanard described in the indictment but as to that affiant is unable to state positively.

S. W. Huntington.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public, State of South Dakota. (Notarial Seal.)

[fol. 86] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE—Filed in N. Y. Dist. Court Nov. 8, 1922

I, Jerry Carleton, Clerk of the District Court of the United States of America in and for the District of South Dakota do hereby certify that on the 17th day of October, A. D. 1922, there was filed in the above entitled Court, on behalf of the defendant, Fred C. Sawyer in the Case of the United States, Plaintiff, vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., Defendants, Motion to Quash Indictment, that attached to and made a part of said Motion to Quash Indictment is the affidavit of Charles L. Rathbun marked

Exhibit "A" and also the affidavit of S. W. Huntington marked Exhibit "B" that I have compared the foregoing copy of said affidavits with the originals thereof, which are in my custody as such clerk, and that such copy is a correct transcript from such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 4th day of November, A. D. 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.

[File endorsement omitted.]

[fol. 87] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to said writ alleges as follows:

1. Upon information and belief that May 20, 1922, the grand jurors of the United States of America for the District of South Dakota did present to the United States District Court for the said district an indictment against the said B. I. Salinger, a copy whereof is hereto annexed marked "Exhibit A," and which said indictment is hereby made part hereof with the same force and effect as if the said indictment were here set forth in full.

[fol. 88] 2. That thereafter, upon information and belief, on October 21, 1922, the United States Commissioner sitting in and for the Southern District of New York did issue his warrant directed to your respondent commanding him in the name of the President of the United States of America to apprehend the said B. I. Salinger, who was then and there in the Southern District of New York, and to bring the said Salinger before him, the said Commissioner, at the Post Office Building in the City of New York, to answer to a complaint praying for the removal of the said Salinger to the said District of South Dakota to answer to the indictment aforesaid.

3. That thereafter the respondent duly apprehended the said Salinger within the Southern District of New York.

4. That thereafter on the 15th day of November, 1922, the relator having been arraigned before the said United States Commissioner, was heard in opposition to the said prayer for removal, and at the con-

clusion of the said hearing the said Commissioner committed the said relator to the custody of your respondent to await an order for the removal of the said Salinger to the said District of South Dakota, there to await trial, and the said relator was taken into custody by your respondent.

The sources of your deponent's information and the grounds of his belief as to the facts hereinbefore alleged are the records of the United States Commissioner for the Southern District of New York.

Wherefore, deponent prays that the writ of habeas corpus herein may be dismissed and that the said B. I. Salinger be remanded to the custody of the respondent to be dealt with according to law.

William C. Hecht.

Sworn to before me this 11th day of November, 1922. Henry Straus, Notary Public, N. Y. County Clerk's No. 854. (Seal.)

[fol. 89] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FURTHER RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshall of the United States for the Southern District of New York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to the said writ

1. Denies on information and belief the allegations contained in folio 23 of Paragraph XII of the petition herein and more particularly that allegation in the said petition, that the said Commissioner ruled that he could not receive the evidence offered by the said relator and that the Commissioner refused to hear and consider the same.

William C. Hecht.

Sworn to before me this 14th day of November, 1922. Henry Straus, Notary Public, N. Y. Co. Clerk's No. 854. (Seal.)

[fol. 90]

RETURN TO WRIT OF CERTIORARI

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Before Hon. Samuel M. Hitchcock, United States Commissioner for the Southern District of New York

1. COMPLAINT

SOUTHERN DISTRICT OF NEW YORK, ss:

Maxwell S. Mattuck, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and on information and belief alleges and charges:

That within the period of three years last past, B. I. Salinger, the defendant above named, was indicted at Sioux Falls, South Dakota, for violating certain statutes of the United States, towit, 215 U. S. C. C. using U. S. mails to defraud.

That an indictment was filed against the said B. I. Salinger in the aforesaid District of South Dakota;

That since the date of the said indictment the said defendant Salinger has been a fugitive from justice from the said District of South Dakota;

That the said defendant Salinger is now within the Southern District of New York, a fugitive from justice as aforesaid; against the peace of the United States and their dignity and contrary to the form of the statutes of the United States in such case made and provided.

The sources of deponent's information and the grounds of his belief are a telegram to the United States Marshal for the Southern District of New York from the United States Marshal for the District of South Dakota.

Wherefore, deponent prays that a warrant may issue for the above named defendant and that he may be apprehended, bailed or removed to the said District of South Dakota as the case may be.

[fol. 91]

Maxwell S. Mattuck.

Sworn to before me this 21st day of October, 1922. Samuel M. Hitchcock, U. S. Commissioner, Southern District of New York.

Approved: M. S. Mattuck, Assistant United States Attorney.

[fol. 92]

WARRANT

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to their Deputies or any or either of them:

Whereas, complaint on oath hath been made to me, charging that B. I. Salinger, Jr. did within the period of three years prior to the 21st

day of October, in the year one thousand nine hundred and twenty-two at the Southern District of South Dakota, use the mails of the United States to defraud; against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said B. I. Salinger, Jr., and bring his body forthwith before me, or some Judge or Justice of the United States, wherever in the Southern District of New York he may be found that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 21st day of October, in the year of our Lord one thousand nine hundred and twenty-two.

Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. William Hayward, United States Attorney.

Endorsed: Warrant to Apprehend. Received this warrant on the 21st day of October, 1922, at New York City, and executed the same by arresting the within named B. I. Salinger, Jr., at New York City on the 21st day of October, 1922, and have his body now in Court, as within I am commanded. William C. Hecht, U. S. Marshal, S. D. of N. Y. Defendant arraigned, bail \$10,000. Hearing adjourned to the 4th day of November, 1922, at ten o'clock, A. M., Paroled for bail. Dated, New York, October 21, 1922. Samuel M. Hitchcock U. S. Commissioner, Southern District of New York.

[fol. 93] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMMITMENT

Before Samuel M. Hitchcock, United States Commissioner

Defendant, 11.8.1922, after having been heard upon the charge against him, ordered, that he be held to answer to the charge and any order of the Court and that he be admitted to bail in the sum of \$5,000 and that he be committed to the custody United States Marshal for the Southern District of New York until such bail is given.

Dated, New York November 8, 1922.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Defendant having given bail, it is ordered that he be released from custody.

Dated, New York,

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Bail fixed in the sum of \$10,000. Defendant paroled in custody of counsel until November 9, 1922, 10:30 A. M.

Bail of Commissioner Hitchcock ordered continued until November 9, 1922.

November 6, 1922.

J. W. M., U. S. C. J.

Final Commitment.

[fol. 94] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

MINUTES OF HEARING BEFORE COMMISSIONER

Hearing Before Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, at New York, at his office, room No. 314, in the United States Court, Post Office Building, city of New York, on November 8th, 1922, at two-thirty p. m.

Appearances: William Hayward, United States Attorney, by M. S. Mattuck, Assistant United States Attorney, Counsel; Gilbert, Campbell & Barranco, 14 Wall Street, New York City, by Richard Campbell and William McCool, Counsel; Wade H. Ellis, Washington, D. C.

Mr. Mattuck: The Government offers in evidence a certified copy of the indictment found in the Western Division for the District of South Dakota on the 20th day of May, 1922, and bench warrant on that indictment issued in the aforesaid district on the 18th day of October, 1922.

Mr. McCool: The defendant objects to the reception of this indictment in evidence upon the following grounds:

I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of [fol. 95] South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein name dwith the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendment of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offence as may be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly, to arrest, or detain or imprison, your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

[fol. 96] VII. Subject to grounds, "I, II, III, IV, V, and VI" hereof, petitioner further states that evidence presented before the Grand Jury as to all the counts contained in said indictment except Counts 1, 4 and 6, thereof, was insufficient to sustain the indictment for the reasons, among others, that no person called as a witness before said Grand Jury had any personal knowledge or whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail, or whether they had been delivered to the addresses thereof by mail, and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are endorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury there was introduced and used certain books, and the legal custodian of

said books although subpoenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII" and "VIII" hereof presents the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IV. That subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner, or the other defendants of the charge against him or them or make the same clear to the common understanding.

X. Subject to grounds "I, II, III, IV, V and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together render it difficult to construe and almost unintelligible.

Furthermore, the indictment charges a scheme by means of fraudulent pretenses with intent to defraud and in connection with said scheme the use of the Post Office establishment. It appears on the face of the indictment that when the letters were written, the [fol. 97] acts had then been completed and executed and were incapable of being furthered by the use of the mails.

And finally that the indictment does not charge what, if anything, was obtained from the victims named in the indictment and does not show any fraud exercised. The only fraud alleged, referring to the sale of shares of stock of the Midland Corporation, and nothing in the indictment to show that they were not worth the consideration that was paid therefor.

Upon all these grounds, Mr. Salinger claims that the indictment should not be received in evidence, it being wholly void on the face thereof.

The Commissioner: I cannot pass upon any such question as that until the indictment is in evidence.

Mr. McCool: Do you overrule my objection, Mr. Commissioner?

The Commissioner: Yes.

Mr. McCool: I save my exception to that.

The Commissioner: Have you a similar objection to the warrant that has been issued pursuant to the indictment?

Mr. McCool: Precisely. That has not been offered yet.

The Commissioner: Yes, it has been offered.

Mr. McCool: I make the same exception to the warrant, on the ground that it is wholly immaterial and not founded on a valid indictment.

The Commissioner: Your objections are overruled at the present time.

Mr. McCool: I respectfully except.

It is now in evidence, and I move to strike it out on like grounds, both the indictment and the warrant.

The Commissioner: Motion denied.

Mr. McCool: I respectfully except.

Mr. Mattuck: The defendant concedes the identity of the witness.

The Government rests.

Mr. McCool: I move to dismiss the proceedings upon the same grounds which I stated in my objection to the reception of the indictment: No evidence to show that there is any valid indictment and no evidence to show that there is any reasonable cause to show the man is guilty.

[fol. 98] The Commissioner: Unless an indictment is so absolutely bad upon its face that there can be nothing said in its favor, it is held practically in every district, and it has been held in the Supreme Court of the United States, that the proper place to raise each objections is in the forum in which the indictment was found.

I have not had an opportunity to examine this indictment at length. It had only been offered to-day and since it has been offered this morning it has been in the custody of counsel for the defendant and the Commissioner has not even read it.

I understand that this matter is one which is to be expedited and that an application is going to be made to the Court in regard to this indictment and that the ends of the defendant will best be satisfied if he rests now on this motion and my ruling; by having me commit the defendant to the custody of the marshal and then you will make such application in the Courts as you may desire.

Mr. McCool: You rule, then, that your Honor will not receive any evidence that this man is not guilty in fact? Does your honor want to go into that?

Mr. Mattuck: Yes, we will receive any evidence you want to offer.

Mr. McCool: We cannot offer any to-day. We want reasonable opportunity to present evidence that the man is not guilty in fact.

The Commissioner: One moment. I do not see a great deal that you can do. It is incurring a large expense. If your objections to the indictment are good and valid, they will be upheld by the Court, and if they are not, the Court will send this matter back to me for further hearing upon your suggestion. Your rights may be saved in that way, whatever rights you may have, but for the purpose of expedition, and you, having been informed that the District Attorney for the demanding district would be here at this time, I think it is only proper that this proceeding should take this course.

Mr. McCool: In other words, the evidence will not be received?

Mr. Mattuck: Just one moment. I will ask the Commissioner not to rule until I have made my statement about the reception of evidence at this time. I would like to make a statement on the record.

The Commissioner: Go ahead.

Mr. Mattuck: When was it you were here with me, Mr. McCool? [fol. 99] Mr. McCool: The 21st of October was the first time.

Mr. Mattuck: No, that you actually came with me to the Commissioner's office?

The Commissioner: That was the 21st of October.

Mr. Mattuck: On the 21st of October, 1922, Mr. McCool came with Government counsel to the office of the United States Commissioner for the purpose of arranging a date mutually convenient to himself and to the Government's counsel for the proceeding with the hearing in this case. At that time and in the presence of the Court, Government's counsel stated to Mr. McCool that the Government would be ready to proceed on Monday, November 6th, with the hearing, at which time the course that the Government would follow would be this: That the indictment would be offered in evidence and that identity of the defendant would be proved, whereupon the Government would rest.

It was also stated at that time by counsel for the Government that Mr. Clark, the District Attorney of the District in which the indictment was found, was coming here and that in order that he may not be put to the inconvenience and expense of remaining in this district over an extended period of time, it was suggested at that time to Mr. McCool that he be prepared on November 6th to go on with the hearing in order that the hearing may be completed within as short a space of time as possible, and that in the event of a commitment by the Commissioner, he would be able to procure his writ and have the matter cleaned up within three days.

Mr. McCool at that time stated that November 6th, would be inconvenient for him but that if I would agree to November 8th, the day following Election Day, it would be absolutely agreeable to him to proceed with the hearing at that time, and in the event of a commitment, to have his papers prepared and to go before the Court on a petition for a writ.

Mr. Mattuck, Government's Counsel, at that time stipulated that that was perfectly agreeable; that on November 8th Mr. Clark would be notified to be here, at which time he would be prepared to go on with an complete the hearing. Mr. Clark coming all the way from South Dakota. Mr. McCool agreed.

Government's counsel now object to any further delay in the going on with this hearing, but does not oppose the admission of any evidence which the defense wished to offer now in rebuttal of the [fol. 100] presumption of probable cause created by the indictment. The objection of Government's counsel is entirely to delay, a delay which ever effort was made by Government's counsel to forestall ten days ago. Within that period of ten days, it is urged that every effort could have been made by the defense to have procured any witnesses which they desired to rebut probable cause. The objection of Government's counsel, therefore, is not to the admission of evidence, but to a delay and a postponement of this hearing on the grounds stated.

Mr. McCool: Before this morning, it was impossible for the defendant to know what indictment he was called to answer in this District. The indictment was inspected this morning. It now shows an indictment found in the Western Division of the District of

South Dakota. I want an opportunity to meet that particular indictment, as we understand another indictment has been found in another Division. There is no desire on the part of the defendant to delay this hearing if the Government is not willing to give us reasonable opportunity to present our witnesses and bring them on and answer this indictment, of course it is impossible to do it today.

I understand that the Commission has ruled that that evidence will not be received, to which I save my exception.

The Commissioner: I have not ruled any such way at all and the record will not show it. On the other hand I appreciate that this hearing before me is for the purpose of taking testimony.

I am perfectly familiar with the case of the United States vs. Green, where the action was decided by Judge Brown in the first instance twenty-five years ago, and I certainly never said that I would not receive evidence. But it is a question of when that evidence should be presented.

It is perfectly clear to my mind what happened before me on the 21st of last month. Then the matter was set over until the 4th of November for the reasons stated, that the District Attorney for the demanding district would be here at that time, and it was suggested that you be prepared at that time to go on with the hearing.

If you are not prepared and the Government has made its prima facie case by presenting this indictment, I have overruled your objection to its receipt in evidence, then of course, I have nothing else to do. The Government demands it and having in mind what the arrangements were and also having in mind that you might have [fol. 101] obtained a copy of the indictment by application to the Court in which it was found.

Mr. Mattuck: Not only that. May I state on the record that there was handed to me, Government's Counsel, the date of the original arrest of Mr. Salinger (that was on October 21st or 22nd), a copy of the indictment itself by counsel for the defense. I think that is a clear rebuttal of the argument that they did not know what they were indicted for.

Mr. McCool: We did not know which indictment we were to answer because there was another indictment.

Mr. Mattuck: We are only calling upon counsel to answer the indictment that he would know about.

Mr. McCool: We were told here that another indictment had been found in another division.

[fol. 102] Mr. Mattuck: If your Honor pleases, the Government's Counsel cannot be responsible for everything the defendants have been told. The defendants are being called upon here to answer an indictment, a copy of which they themselves gave me some fifteen days ago.

Mr. McColl: There is not any use of our going ahead with our proofs for just one section of it. It is not going to do the defendant any good until he can bring all his witnesses here.

Mr. Mattuck: You are just attacking the matter here and I do not see any useful purpose in it.

Mr. McCool: We make our offer, if reasonable opportunity is given

to us, to prove that we are not guilty of fact. I understand that the Government objects to reasonable opportunity being given.

Mr. Mattuck: The Government objects to an adjournment.

Mr. Campbell: Which is the same thing.

The Commissioner: I do not understand that it is the same thing. You had this indictment before you at the time that this defendant was here and then you were given from the 21st of October until the 4th of November to prepare for this hearing.

Mr. Campbell: Up to this morning, we did not know to which of these Indictments we were going to answer. I understand that there is another indictment.

Mr. Mattuck: I do not understand anything about it. We are not responsible for the understanding of counsel.

The Commissioner: I have passed upon this matter.

Mr. Mattuck: The indictment which you are called upon to answer is the indictment which you have had in your possession for a long time; just how long, I do not know, but certainly from the date of the inception of this hearing.

Mr. McCool: Anything thing that I would like to call your Honor's attention to in support of the reasonableness of my request is this: Part of our proof consists of the books of the company. We are enjoined at this time by the order of the Court, as I understand it, from even looking at those books, much less producing them. We would have to have opportunity to have that order vacated and [fol. 103] bring those books on, so that we could prove our case. It would take at least fifteen days to try this case on its merits.

Mr. Mattuck: In answer thereto, Government's counsel will offer a certified copy of the proceedings that have heretofore taken place in the District of South Dakota, wherever it is. I would like to state on the record, if your Honor please, just what has taken place in this case. Then I will offer the paper itself in evidence, if necessary.

The indictment, as already stated, was found on the 20th day of May, 1922. Two of the defendants, not the defendant Salinger, were arraigned and pleaded to the Indictment on the 17th day of October, 1922. The defendant Salinger was arrested.

Mr. McCool: How is all this relevant on the question of probable cause?

Mr. Mattuck: Not competent at all on the question of probable cause. The question that you have just raised is the question of whether or not the defendant is to be given reasonable opportunity to produce the books. I am going to show that he has had reasonable opportunity to get books, make motions and everything else.

Mr. McCool: That is not the question here before the Commissioner.

Mr. Mattuck: You just raised the question.

Mr. McCool: The question is whether we shall have reasonable opportunity now.

Mr. Mattuck: The counsel can very well come in three weeks from now and ask for further reasonable opportunity. I am trying to show that reasonable opportunity has been had by counsel for a long time.

Mr. McCool: I cannot see that that is relevant. We have not had reasonable opportunity to produce the evidence on this hearing.

Mr. Mattuck: I have answered that again by stating that ten days—

Mr. McCool: I say that ten days is not enough.

Mr. Mattuck: May I be permitted to finish my argument in answer to his for the purpose of the record?

The Commissioner: Yes, I will not stop you.

Mr. Mattuck: The defendant Salinger gave bail in the District of Iowa, Northern District, on the 13th day of June, 1922. Bond in the sum of \$10,000 was given by the defendant Salinger for appearance in South Dakota. Thereafter the trial date was set for the 17th day of October, 1922, at which time the defendant Salinger [fol. 104] did not conform to the condition of his bond, did not appear in the District of South Dakota for trial, and the bond in that District was thereupon ordered forfeited.

It is, therefore, submitted with regard to the question of a motion for the return of books or whatever argument it was that Mr. McCool made with regard to further time, that such a motion is being interposed here merely for purposes of delay, because reasonable opportunity for the defendant Salinger was given to him between the dates of the filing of the indictment and certainly between the dates of his furnishing bond for his appearance in South Dakota, and the date of trial, to take such steps as he deemed necessary for the purpose of procuring books and other evidence which he deemed necessary. For the purpose of this hearing, it is again submitted that in view of the stipulation entered into between counsel to proceed on this day that no adjournment should be granted at this time.

Mr. McCool: In answer to that, counsel for the defendant very respectfully but very earnestly objects to any statement that he is attempting to delay this proceeding. He states his purposes here are to attempt to aid his client, not to impede the progress of the government.

The Commissioner: Is there any motion before me now?

Mr. McCool: Yes, sir, the motion is for reasonable opportunity to get these books which have been enjoined.

The Commissioner: I take it that that is a motion for an adjournment.

Mr. McCool: Yes, sir.

The Commissioner: I shall deny that motion.

Mr. McCool: I respectfully except.

The defendant offers in evidence what purports to be an affidavit of Mr. S. W. Clark, United States Attorney for the District of South Dakota, verified October 17th, 1922, and a copy of an order of transfer granted by the Honorable James D. Elliott, District Judge of the District Court of the United States for the District of South Dakota, Western Division.

You concede, Mr. Mattuck, that those are true copies?

Mr. Mattuck: Yes. That concession should not be taken to mean that there is no objection to their admission in evidence. Yes, I will concede that they are the affidavits. They bear the original signature of Mr. Clark. They are copies.

Mr. McCool: And that the contents thereof are true?

[fol. 105] Mr. Mattuck: And that the contents are true.

Mr. McCool: The defendant offers in evidence a certified copy of an affidavit of S. W. Clark, verified October 17, 1922.

Mr. Mattuck: No objection to those things going in.

Mr. McCool: And an order of the Honorable James D. Elliott, judge of the United States District Court, District of South Dakota, Western Division, dated October 17th, 1922, transferring the above entitled cause from the Western Division of South Dakota to the Southern Division thereof. I ask that they be marked defendant's Exhibits A and B.

(Marked Defendant's Exhibits A and B respectively.)

Mr. McCool: The defendant rests and now renews his motion to dismiss.

The Commissioner: Motion is denied.

Mr. McCool: To which the defendant respectfully excepts.

The Commissioner: Of course, this brings this matter to a conclusion.

[fol. 106] NOTE.—The Indictment herein, same as Indictment copied at page — of this Transcript.

[fol. 107] 6. BENCH WARRANT

To the Marshal of the United States for the District of South Dakota and to his deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid, on the 20th day of May, A. D., 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court, may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota to answer the indictment aforesaid; the bail bond of said defendant having been this day forfeited by the Court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 18th day of October, A. D., 1922.

Jerry Carleton, Clerk. (Seal of Court.)

[fol. 108] [File endorsement omitted.]

Warrant returned and filed this 20th day of October, A. D., 1922.
 Jerry Carleton, Clerk, By C. C. Schwartz, Deputy.

UNITED STATES OF AMERICA,
 District of South Dakota, ss:

Received this Warrant on the 18th day of October, 1922, and after a due and diligent search I am unable to find the within-named defendant, B. I. Salinger, Jr., within this District.

W. H. King, U. S. Marshal, By N. H. Jensen, Deputy.

[fol. 109] (Seal of Court.)

UNITED STATES OF AMERICA,
 District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of Said Court, at Sioux Falls in said District this 20th day of October, A. D., 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy. (Seal.)

[fols. 110 & 111] DEFENDANT'S EXHIBIT B

In the District Court of the United States, District of South Dakota,
 Western Division

No. 983—W. D.

Application for Order of Transfer

Omitted; printed side page 42 Ante

[fol. 112] DEFENDANT'S EXHIBIT A

In the District Court of the United States, District of South Dakota,
 Western Division

No. 983—W. D.

[Title omitted]

Order of Transfer—Filed Oct. 17, 1922

Application having been made by the United States Attorney for the District of South Dakota, for a transfer of the above entitled

cause from the Western Division of the District of South Dakota to the Southern Division thereof, said application being presented in open Court and in the presence of the defendant Fred C. Sawyer and of their attorneys, and good cause being shown;

It is now ordered that the above entitled cause be and the same is hereby transferred from the Western Division of the District of South Dakota to the Southern Division of the District of South Dakota, and that all further proceedings herein be had in said Southern Division.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 17th day of October, A. D., 1922.

By the Court:

Jas. D. Elliott, Judge. Defts. except. Jas. D. Elliott, Judge.

Attest: Jerry Carleton, Clerk. (Seal of Court.)

[File endorsement omitted.]

[fol. 113] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 23rd day of October, A. D., 1922.

(Signed) Jerry Carleton, Clerk. (Seal of U. S. District Court, Dist. of So. Dakota.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

JUDGE'S CERTIFICATE

I, James D. Elliott, Judge of the District — of the United States, within and for the District afore mentioned, the same being a Court of Record, within and for the District aforesaid, do hereby certify that Jerry Carleton is Clerk of said Court, and was such Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D., 1922.

(Signed) Jas. D. Elliott, Judge of the District Court of the United States for the District of South Dakota. (Seal of the District Court of the United States for the District of South Dakota.)

[fol. 114] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE TO JUDGE

I, Jerry Carleton, Clerk of the District Court of the United States of America within and for the District aforesaid, do hereby certify that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D., 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

AT A TERM OF THE UNITED STATES DISTRICT COURT HELD IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AT THE COURT HOUSE THEREOF, IN THE BOROUGH OF MANHATTAN, NEW YORK CITY, ON THE 15TH DAY OF NOVEMBER, 1922.

Present: Hon. Julian W. Mack, C. J.

[Title omitted]

ORDER DISMISSING WRITS

The writs of habeas corpus and certiorari heretofore allowed to the above named B. I. Salinger, Jr., having duly come on to be heard before the Honorable Julian W. Mack, Circuit Judge, at a term of this Court, held on the 13th day of November, 1922, and after hearing William P. McCool, of counsel for petitioner, in support of said writs, and Maxwell M. Mattuck, Esq., Assistant United States Attorney, in opposition thereto and due deliberation having been had thereon, on motion of William Hayward, United States Attorney.

Ordered, that said writs be and the same hereby are dismissed.
Enter.

Julian W. Mack, C. J.

[fol. 115] THE UNITED STATES OF AMERICA,
Southern District of New York:

WARRANT OF REMOVAL

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to his Deputies or any or either of them:

Whereas, B. I. Salinger, Jr., has been brought before me upon a commitment made by a United States Commissioner in this District for the purpose of obtaining a warrant for the removal of the said B. I. Salinger, Jr., to the District of South Dakota, in which District the offense for which said prisoner has been so committed is to be tried, a copy of which commitment is hereto attached;

And whereas, the United States Attorney for the Southern District of New York has made application to me under the provisions of the Revised Statutes of the United States, for a warrant for the removal of said prisoner to the District of South Dakota, and an examination of the matter having been made by me;

Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota and there deliver him to the United States Marshal for the District of South Dakota, or some other proper officer authorized to receive said prisoner, in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States for the Southern District of New York, at the Borough of Manhattan, City of New York, this 15th day of November, 1922.

Julian W. Mack, Circuit Judge.

[fol. 116] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Habeas Corpus

PETITION FOR APPEAL AND ADMISSION TO BAIL PENDING APPEAL

And now comes B. I. Salinger, Jr., and respectfully represents that on the 13th day of November, 1922, a judgment was entered by this Court dismissing his petition for habeas corpus and certiorari and remanding him in custody of Hon. William Hecht, United States Marshal for the Southern District of New York, awaiting removal to the Western Division of the District of South Dakota.

And your petitioner respectfully shows that in said record proceedings and order in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner all of which will appear more in detail in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed him from said order to the United States Circuit Court of Appeals for the Second Circuit, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal to the said Court, and that the petitioner may have thirty days to prepare and file his bill of exceptions herein.

Gilbert, Campbell & Barranco, Attorneys for Petitioner, 14 Wall Street, New York City.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER GRANTING APPEAL AND ADMISSION TO BAIL

On reading of the petition of B. I. Salinger, Jr., for appeal and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is herewith allowed. And it appearing to the Court that a citation was duly served as provided by law, it is ordered that petitioner be admitted to bail pending the final determination of this appeal in the sum of \$10,000, the appeal to operate as a supersedeas.

Costs bond on appeal is hereby fixed in the sum of \$250.00. Petitioner allowed up to and including December 13, 1922, to make and file his bill of exceptions herein.

New York, November 15, 1922.

Julian W. Mack, Judge.

[fol. 118] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes B. I. Salinger, Jr., by Gilbert, Campbell & Barranco, his attorneys, and in connection with his petition of an appeal, says that in the record and proceedings and order aforesaid, and during the hearing of the above entitled cause in said District Court, error has intervened to his prejudice, and this defendant her assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant, is wrongfully held and illegally imprisoned, and in dismissing his petition and remanding him into custody for removal from the Southern District of New York to the Southern Division of the District of South Dakota.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for removal.

4. The Court erred in dismissing the petition for certiorari.

5. The Court erred in holding that the Commissioner did not err in receiving into evidence, over the objection and exception of petitioner, certified copy of indictment alleged to have been returned against this petitioner and others by the Grand Jury of the Western Division of the District of South Dakota, and in admitting to evidence certified copy of bench warrant founded on said indictment; and furthermore, in refusing to strike out the said indictment and bench warrant upon the motion of petitioner; and the Court erred further in refusing to sustain the exceptions taken by the petitioner before the Commissioner to the Commissioner's ruling admitting the said documents in evidence and in refusing to strike the same out.

[fol. 119] 6. The Court erred in refusing to hold that the said Commissioner was in error in his finding that there was probable cause to believe that the petitioner was guilty of the commission of any offense against the United States and in particular of the offense attempted to be set forth in the said indictment.

7. The Court erred in refusing to hold that the Commissioner erred in his refusal to afford to the petitioner reasonable opportunity of proving that said petitioner was not guilty in fact of any crime against the United States and particularly of the crime attempted to be set forth in said indictment.

8. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

9. The Court erred in refusing to hold that said Indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants named therein with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any division thereof.

10. The Court erred in refusing to find that said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

11. The Court erred in refusing to find that if any offense against the laws of the United States was changed in and by said indictment

at all (the petitioner maintaining that no such offense was so charged), that such facts as are charged show that no offense was committed by the petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of the rights under Section Three of Article Three thereof.

[fol. 120] 12. The Court erred in failing to sustain the petitioner in his protest that said indictment did not charge any offense at all, and if any, none within the jurisdiction of the Court to which said Indictment was returned, and in failing to sustain the petitioner's protest that in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of the District of South Dakota whereas as it appears upon the face of the Indictment said indictment was returned at and by a Grand Jury sitting in and for the Western Division of the District of South Dakota.

13. The Court erred in refusing to hold that by reason of the provisions of Section 53 of the Judicial Code of the United States the said Grand Jury sitting in and for the Western Division of the District of South Dakota was entirely without power or authority to return said indictment and said Court was without power or authority to receive it and that the District Court of the United States for the Southern District of New York was for like reasons without power or jurisdiction to take any proceedings under said invalid indictment and particularly to arrest or detain or imprison your petitioner upon any warrant issued founded upon said indictment and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota and in any event without power to direct the return of your petitioner to the Southern Division of the District of South Dakota in which division [fol. 121] in any event no indictment has been found against the petitioner.

14. The Court erred in refusing to hold that the said Grand Jury sitting in and for the Western Division of South Dakota was in any event without power or authority to hear any charge against your petitioner or to return any indictment against him for the reason that said Grand Jury was illegally and unlawfully called and constituted and for the reason, among others, that said Grand Jury was not composed of Citizens of the United States residing within the Western Division of the District of South Dakota, but that many of the members of said Grand Jury resided in other Divisions of the District of South Dakota and that for that reason were and are disqualified from acting upon the Grand Jury sitting in and for the Western Division of South Dakota.

15. The Court erred further in refusing to hold that subject to the foregoing objections that the evidence presented before the

Grand Jury as to all the counts contained in said indictment excepting counts 1, 4, and 6 thereof were insufficient to sustain the indictment for the reason, among others, that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay evidence of some or all of the persons whose names are endorsed on the indictment as witnesses before said Grand Jury; and furthermore, said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony and particularly because at the hearing before the Grand Jury there was introduced and used certain books and the legal custodian of said books, although subpoenaed to appear and actually in attendance upon said Grand Jury to testify to the identify and custody of said records was not called as a witness and did not lay the foundation in the introduction or use thereof, as appears more particularly by the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment, copies of which affidavits were submitted to the Court upon the petition for habeas corpus herein.

[fol. 122] 16. The Court erred in refusing to hold that subject to grounds 1 to — inclusive hereof that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is regnant, to-vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and furthermore, that said indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations which defects when taken together render it difficult to construe and almost unintelligible and particularly fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment whether by means of the said letters or otherwise.

17. The Court erred in refusing to hold that the proceedings before the Commissioner *was* improperly conducted and that no proper or sufficient evidence was introduced thereon to establish that there was probable cause to believe the petitioner guilty of any crime and particularly of the alleged crime attempted to be set forth in the said indictment.

18. The Court erred in refusing to find that the Commissioner erred in refusing to dismiss the proceedings before him and in refusing to grant the motion made by petitioner to dismiss the same and the Court erred further in refusing to sustain the petitioner's exceptions to said ruling of said Commissioner.

19. The Court erred in holding that the return made by William C. Hecht, Marshal of the United States for the Southern District of New York to the writ of habeas corpus was sufficient to create an issue and that the facts therein stated were sufficient to justify the said Marshal in detaining your petitioner.

20. The court erred in refusing to hold that the Court had no jurisdiction of the petitioner for the reasons more particularly hereinbefore set forth and in refusing to find that the Commissioner had no power to order the arrest of your petitioner and in refusing further to find that the Marshal was without power to arrest or imprison him, for the reason that the warrant issued by said Commissioner was based solely upon an alleged indictment which was patently and manifestly insufficient to charge any crime as more particularly hereinbefore set forth and therefore said warrant was and is illegal and without justification in law and the arrest made thereunder was unwarranted, unjustified and illegal.

[fol. 123] 21. The Court erred further in finding that the proceeding conducted by the Commissioner was proper and lawful and that the evidence introduced upon the hearing before the Commissioner by the Government was legal evidence and sufficient to establish there was probable cause to believe the petitioner guilty of any crime.

22. The Court erred further in refusing to sustain the petitioner's exceptions to the Commissioner's refusal to allow petitioner to introduce evidence to establish that he was not guilty in fact, such refusal being based upon the sole ground that the Government urged that to permit of such opportunity would inconvenience the District Attorney for the District of South Dakota without proof upon the part of the Government that the affording of such reasonable opportunity would in any wise prejudice the United States of America.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

Gilbert, Campbell & Barranco, Attorneys for Petitioner and Appellant.

IN UNITED STATES DISTRICT COURT

MEMO. AS TO BOND

Approved appeal and supersedeas bail bond filed Nov. 14, 1922 (not printed).

IN UNITED STATES DISTRICT COURT

CITATION ON APPEAL—Omitted in printing

[fol. 124] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

M 7-356

[Title omitted]

DOCKET ENTRIES

Attorneys: Gilbert, Campbell & Barranco, 14 Wall, St., N. Y. C.

1922.

- Nov. 8. Filed Petition for Habeas Corpus and Certiorari and issued
Writ—Ret. 11, 13, 22.
“ 9. “ Bond \$10,000—Southern Surety Co.
“ 11. “ Affdt. of U. S. Marshal, S. D. of N. Y. as to dismiss-
ing Writ.
“ 14. “ Affdt. of U. S. Marshal, Wm. C. Hecht.
“ “ “ Order dismissing Writs.
“ “ “ Assignment of Errors.
“ “ “ Petition and Order allowing appeal.
“ “ “ Writ of Certiorari.
“ “ “ Writ of H. C.
“ “ “ Citation on appeal to C. C. A. Ret.
“ 17. “ Bond—\$10,000—Southern Surety Co.
Nov. 8. Filed Bond for Costs \$250—Southern Surety Co.
Dec. 12. “ And Issued Writ of Error.

A true copy. Alexander Gilchrist, Jr., Clerk. (Seal.)

[fol. 125] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ORDER TO CERTIFY RECORD

On reading the annexed præcipe and stipulation dated December 26, 1922, by and between the attorneys for petitioner and the United States Attorney, in the above case, it is

Ordered, that the clerk certify the transcript of record on the appeal taken by the plaintiff from order dismissing writs of habeas corpus and certiorari in accordance with said stipulation and præcipe.

Dated, N. Y., December 27, 1922.

J. W. Mack, U. S. C. J.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated that the clerk of the District Court of the United States for the Southern District of New York may certify the transcript of record on the appeal in accordance with the præcipe hereto annexed.

Dated, December 26, 1922.

Gilbert, Campbell & Barranco, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

Counsel for the respective parties agree that the following and no [fol. 126] other papers constitute the transcript of record.

Indictment, complaint, warrant, commitment, bench warrant, bill of exceptions, petition for leave to appeal, order allowing appeal, assignment of errors, petition for writ of habeas corpus and certiorari, writ of error, orders extending time to file record, writ of habeas corpus, writ of certiorari, return to writs, warrant of removal, order dismissing writs, citation on appeal, præcipe, stipulation on præcipe, order approving præcipe, stipulation re certification, clerk's certificate.

Dated, December 26, 1922.

Gilbert, Campbell & Barranco, Attorneys for Petitioner.
William Hayward U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the rec-

ord of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York, this 27th day of December, in the year of our Lord One Thousand nine hundred and twenty-two and of the Independence of the said United States the One hundred and forty-sixth.

Alexander Gilchrist, Jr., Clerk.

[fol. 127] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages numbered from 1 to 140 inclusive, contain a true and complete transcript of the record on appeal filed in this court in the case of In the Matter of B. I. Salinger, Jr., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit this 13th day of April in the Year our Lord One Thousand Nine Hundred and twenty-three and of the Independence of the United States the One Hundred and Forty-seventh.

(Signed) Wm. Parkin, Clerk. (Seal.)

[fol. 128] EXHIBIT IN EVIDENCE: BOND ON REMOVAL TO THE DISTRICT OF SOUTH DAKOTA—Filed April 20, 1923

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered that on this 20th day of March, in the year of our Lord, one thousand nine hundred and twenty-three, before me Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit, personally came B. I. Salinger, Jr., principal, and Southern Surety Company of Des Moines, Iowa, Surety, and acknowledged themselves to owe to the United States of America, that is to say, the said B. I. Salinger, Jr., the sum of Fifteen Thousand (\$15,000) Dollars, and the said Southern Surety Company of Des Moines, Iowa the sum of fifteen thousand (\$15,000) Dollars separately to be levied and made of their respective goods and chattels, lands and tenements to use of the said United States of America, if default shall be made in the following conditions *following*, to-wit:

Now therefore the conditions of this recognizance are such that if the said B. I. Salinger Jr., shall appear for trial at the District Court of the United States for the District of South Dakota, to be holden at the City of Sioux Falls in said District on the First Tuesday of April, 1923, at 10:30 o'clock in the forenoon of said day, upon an indictment filed in said district, Southern Division, and shall appear before said District Court of the United States for the District of South Dakota, on such day or days thereafter as said District Court may order, and shall at all times render himself amenable to the order and process of the said Court, to answer all such things and matters as shall be objected against him, and not depart the jurisdiction of the Court without leave; and if convicted shall appear for judgment, and render himself in execution thereof upon such day as said District Court may order, then this recognizance to be void, otherwise to remain in full force and virtue.

B. I. Salinger, Jr., Principal. Southern Surety Company,
By Hulbert T. C. Beardsley, Attorney-in-Fact. (Seal.)

Acknowledged before me the day and year first above written.
Alex. Gilchrist, Jr., Clerk of the District Court of the
United States for the Southern District of New York.
(Seal.)

A true copy. (Signed Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 129] EXHIBIT IN EVIDENCE: COPY OF ORDER ON MANDATE OF
U. S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT—
Filed April 20, 1923

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby Certify that the Writings annexed to this Certificate, to-wit Order on Mandate, in case of B. I. Salinger, Jr., Miscellaneous Docket 7/356, filed in this Court on March 16, 1923, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this Second day of April, in the year of our Lord, One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

(Signed) Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 130] AT A STATED TERM OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK HELD AT THE UNITED STATES COURT-HOUSE AND POST-OFFICE BUILDING, IN THE BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 16TH DAY OF MARCH, 1923

Present: Hon. Augustus N. Hand, District Judge.

M. 7-356

[Title omitted]

ORDER ON MANDATE

This cause having heretofore come on for hearing in this Court upon writs of habeas corpus and certiorari allowed to the above named B. I. Sallinger, Jr., and an order having been entered in said cause dismissing said writs, and the said B. I. Salinger, Jr., having thereafter by an appeal obtained a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals having transmitted to this Court its mandate dated March 14th, 1923, by which it appears that, at the October Term of said Court for 1922, this cause came on to be heard and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the order of said District Court be affirmed and that such further proceedings be had in said cause, in accordance with the decision of the said United States Circuit Court of Appeals as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now upon reading and filing said mandate and upon motion of William Hayward, United States Attorney for the Southern District of New York, it is hereby

Ordered, adjudged and decreed that the judgment and order of the said United States Circuit Court of Appeals in this Cause be and the same is hereby made the judgment of this Court, and it is further

[fol. 131] Ordered that the said B. I. Salinger, Jr., personally surrender himself into the custody of the United States Marshal for the Southern District of New York, New York, N. Y., on or before the 19th day of March, 1923, at 10:30 o'clock in the forenoon, and that the said United States Marshal transport the said B. I. Salinger, Jr., to the District of South Dakota, and there deliver the said B. I. Salinger, Jr., into the custody of the United States Marshal for said District, then and there to be dealt with according to law.

(Signed) Augustus N. Hand, United States District Judge.

[fol. 132] EXHIBIT IN EVIDENCE: MINUTE ENTRIES OF U. S. DISTRICT COURT, DISTRICT OF SOUTH DAKOTA—Filed April 20, 1923

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DIVISION OF THE DISTRICT OF SOUTH DAKOTA

At a session of the District Court of the United States for the District of South Dakota, continued and held pursuant to adjournment, in the United States Court Room, in the City of Sioux Falls in the District of South Dakota, on the 3rd day of April, A. D. 1923, the Honorable James D. Elliott, Judge, being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

THE UNITED STATES, Plaintiff,

vs.

FRED C. SAWYER, CLARENCE H. BURLINGAME, and B. I. SALINGER, Jr., Defendants.

MINUTE ENTRIES

Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the arraignment of the defendant, B. I. Salinger, Jr., and said defendant not appearing in court, and having been three times severally called at the court room door by the United States Marshal to appear in court, as he was bound to do, or forfeit his bond, and having made default said United States District Attorney, S. W. Clark, Esq., moves the Court for the forfeiture of the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, heretofore given for his appearance before this Court at this time; and said United States District Attorney also moves the Court for a bench warrant to issue forthwith for the arrest of said defendant; whereupon, it is Ordered, by the Court that the hearing on said motions, be and the same is hereby set down for April 4th, A. D., 1923, at two o'clock in the afternoon and the United States District Attorney is directed to so notify the attorney for said defendant.

And afterwards, to-wit, on the 4th day of April, A. D., 1923, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

THE UNITED STATES, Plaintiff,

vs.

FRED C. SAWYER, CLARENCE H. BURLINGAME, and B. I. SALINGER, Jr., Defendants.

[fol. 133] This being the time fixed by the Court for hearing, the motion for the forfeiture of the bail of defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, under Indictment No. 1978 S. D., and the matter coming on for hearing, the Court directs the Marshal to call said defendant three times at the door of the court room, the Marshal reports that he has so called the said defendant and that said defendant failed to appear; and the United States District Attorney, S. W. Clark, Esq., having renewed his motion for the forfeiture of the bail bond of B. I. Salinger, Jr., which had heretofore been presented to this Court in the sum of Fifteen Thousand Dollars, conditioned for the appearance of B. I. Salinger, Jr., before this Court on the 3rd day of April, A. D. 1923, at the opening of the Term, the Court states that in his opinion the defendant has not only disregarded his duty under his obligation, as set forth in the terms of this bond to appear here, but that he has resorted to say the least, to most questionable methods; that he has no confidence whatever in the position assumed by counsel for defendant that this defendant could by collusion with a bonding company go to a distant jurisdiction and surrender himself there and that a United States Commissioner could fix a bond of \$5,000.00, the terms of which are entirely unknown to this jurisdiction at this time, and thereby relieve him from the necessity of fulfilling the obligation of this bond by surrendering himself here for trial; whereupon, it is Ordered by the Court, that the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, conditioned as above stated be, and the same is hereby forfeited; and it is further Ordered that the Clerk of this Court file the telegrams presented by the United States Attorney relating to the present whereabouts of said Defendant.

And, to-wit, on the same day, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

THE UNITED STATES, Plaintiff,

vs.

FRED C. SAWYER, CLARENCE H. BURLINGAME, and B. I. SALINGER, Jr., Defendants

[fol. 134] Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the Court for the issuance of a bench warrant for the arrest of B. I. Salinger, Jr., by reason of the forfeiture of his bond, and the fact that he is under indictment and has not responded; whereupon, it is Ordered by the Court, that a warrant issue forthwith for the arrest of the said defendant, B. I. Salinger, Jr., returnable forthwith at Sioux Falls, South Dakota.

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that the above and foregoing are true copies of the entries made upon the Journal of the proceedings of said Court, in the case therein entitled; that I have compared the same with the original entries thereof, and the same is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said Court, at Sioux Falls, this 5th day of April, A. D., 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal.)

[fol. 135] EXHIBIT IN EVIDENCE: BENCH WARRANT—Filed April 20, 1923

UNITED STATES OF AMERICA,
District of South Dakota:

To the Marshal of the United States for the District of South Dakota and to his deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid on the 20th day of May, A. D., 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against, B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger,

Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid, the bail bond of said defendant having been this day forfeited by order of the Court.

Witness, The Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 4th day of April, A. D., 1923.

(Sgd.) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal of Court.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received the within Warrant on the 4th day of April, 1923, and after a due and diligent search I am unable to find the within-named Defendant Ben I. Salinger, Jr., within this District.

W. H. King, United States Marshal, By N. H. Jensen,
Deputy.

[fol. 136]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 5th day of April, A. D., 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal.)

[fol. 137] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF LOUISIANA

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his deputies or any or either of them:

Whereas: Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner for the purpose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota, in which said District the said Ben I. Salinger, Jr., is charged with a violation of

Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

And whereas the Assistant United States Attorney for the Eastern District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me: Now, Therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States, for the Eastern District of Louisiana, at the City of New Orleans, this 26th day of April, 1923.

(Signed) Rufus E. Foster, Judge.

[fol. 138]

FINAL MITTIMUS

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the keeper of the House of Detention in the city of New Orleans, Greeting:

Whereas, Ben I. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May 1922, in said District, in violation of Sec. 215 C. C. of the United States, unlawfully use- the mail with a scheme to defraud,

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben I. Salinger, Jr., committed said offense as charged, I have directed that said Ben I. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 day of April 1923 and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben I. Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you, the Keeper of said Jail of said City, to

receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District, this 18 day of April A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal)

Received this Mittimus with the within named Prisoner, on the 18 day of April A. D. 1923, and on the same day I committed the said Prisoner to the custody of the Jail Keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated April 18, 1923.

(Signed) Victor Loisel, United States Marshal, Eastern District of Louisiana.

[fol. 139] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed April 27, 1923

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

The undersigned petitioner, B. I. Salinger, Jr., feeling himself aggrieved by the proceedings, orders and rulings had in the District Court of the United States for the Eastern District of Louisiana in a case therein pending, entitled "In the Matter of the Petition of B. I. Salinger, Jr., for Writ of Habeas Corpus," and numbered therein, 17,233, and particularly by an order of said Court rendered and entered therein on the twenty-sixth day of April, A. D., 1923, ordering that the writ of habeas corpus heretofore issued therein on behalf of said petitioner be dismissed, and dismissing the same, hereby prays that an appeal by writ of error from said judgment may be allowed to him to the said Supreme Court of the United States, in accordance with law and the rules and practices of said Supreme Court and that upon the service of citation the said appeal may operate as supersedeas until the final disposition of the case by the Supreme Court of the United States.

And in support of this petition, your petitioner herewith presents and files his assignment of errors, particularly specifying the errors relied upon by him upon his said appeal.

(Signed) B. I. Salinger, Jr., Petitioner, by (Signed) St. Clair Adams, his Attorney.

[fol. 140] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal by Writ of Error to the Supreme Court of the United States for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith,

It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana, to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served and returned in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States, and that to effect said supersedeas the said B. I. Salinger, Jr., shall enter into an undertaking in the sum of One hundred Dollars, with sureties to be approved by this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of a supersedeas bail bond in the penal sum of Five Thousand Dollars, with sureties to be approved by the Clerk of the United States District Court, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said Court and not depart the same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at New Orleans, La., this 27th day of April, A. D., 1923.

(Signed) Rufus E. Foster, Judge United States District Court, Eastern District of Louisiana.

[fol. 142] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 27, 1923

Now comes the petitioner above named and in connection with his petition for appeal by Writ of Error, in the above entitled cause, filed herewith his Assignment of Errors which he says occurred in the

proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings therein had and entered; and says that there was and is manifest error appearing upon the face of the record, and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into custody for removal from the Eastern District of Louisiana to the Southern Division of the District — South Dakota.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

[fol. 143] 3. The Court erred especially in ordering the removal of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of Section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed, and to transfer for trial to the division in which it is charged the offense was committed—wherefore, the Court erred, in any view in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota in which it is charged the offense was committed.

5. The Court erred in following the *Biggerstaff v. U. S.* (C. C. A.) 260 Fed. p. 926, which in passing upon the provision of said Section 53, that "all prosecutions shall be had in the Division in which committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division wherein it is charged the offense was committed and said decision is in opposition to the decision of the Supreme Court of the United States in *Post v. U. S.* 161 U. S. 8, 583; 16 Sup. Ct. 611; *Virginia* 148 U. S. 107; 13 Sup. Ct. 586 and *Chennault v. U. S.* 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and, as well, contrary to reason.

6. The *Biggerstaff* case should not have been followed for the further reason that it proceeds in contradiction of the rule that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legisla-

tive history, and of the general understanding as to where venue lies for prosecution for violation of Section 215.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, [fol. 144] because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth Amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the northern District of the State of Iowa, the court erred because it disregarded the decision in *Stever v. U. S.* 222, U. S. 167 and in *U. S. v. Steuard* (C. C. A.) 119 Fed., —, —, v. Conrad, 59 Fed., 485, and disregarded the provisions of the fifth and sixth amendments to and Section three of Article three of the Constitution of the United States.

9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two *coindicttees*, and in failing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by any of the letters counted on other than those which it is charged he himself wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it is to be said that in the *Stever* case, there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment be assumed, the only overt acts charged to be in execution of the scheme or conspiracy is mailing, etc., at Sioux City, Iowa.

[fol. 145] 13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the pleader that these letters were in execution or attempted execution of the scheme and artifice described in the indictment; and it erred in failing and refusing to hold that said letters and each of them showed on their face that that dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority

granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged scheme for in that, the indictment charges said sales to be part of the scheme and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the court in acting under it deprived petitioner of the rights guaranteed to him by the eighth amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegation, which defects, when taken together, render it difficult to construe [fol. 146] and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment, whether by means of the said scheme and said letters or otherwise.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

(Signed) St. Clair Adams, Attorney for Plaintiff in Error

[fol. 147] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF LOUISIANA

New Orleans, Thursday, April 26th, 1923.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, Judge.

[Title omitted]

JUDGMENT

Extract from the Judgment Book, February Term, 1923

This cause came on at a former day to be heard upon the application of the relator for a writ of habeas corpus herein and after hearing the pleadings and the evidence and testimony offered on behalf of the respective parties, and arguments of counsel the cause was submitted when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the reasons of the Court orally assigned;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the application of the relator for a writ of habeas corpus be, and the same is hereby denied, that the said petition of the relator be dismissed with costs and that the said relator, Ben. I. Salinger, Jr., be remanded to the custody of Victor Loisel, United States Marshal, for this District.

Judgment rendered April 26th, 1923.

Judgment signed, April 26th, 1923.

(Signed) Rufus E. Foster, Judge.

[fol. 148] UNITED STATES DISTRICT Ct., EASTERN DISTRICT OF
LOUISIANA

No. 17233

[Title omitted]

PRÆCIPE FOR APPELLANT—Filed May 3, 1923

To the Clerk of the United States for the District Court for the
Eastern District of Louisiana, New Orleans Division:

SIR:

You will please incorporate in the transcript of appeal to the Supreme Court of the United States, in the above entitled and numbered cause, the following:

1. Petition for writ of habeas corpus.

2. Return of the Marshal to said petition.
 3. Certified copy of the indictment.
 4. Certified copy of the application for an order of transfer of the cause from the Southern Division of the District Court of the United States for the District of South Dakota, to the Western Division of said District.
 5. The note of evidence taken in these proceedings on the 20th day of April, 1923, containing the evidence of Fred C. Sawyer, C. H. Burlingame, B. I. Salinger, Jr., and T. I. Galbreath.
 6. Copy of the Government's motion praying for an order of removal of B. I. Salinger, Jr. and copy of the commitment attached thereto.
 7. Judgment.
 8. Petition for appeal to the Supreme Court of the United States.
 9. Order of the Court allowing appeal with supersedeas.
 10. Assignment of errors.
- Yours truly, (Signed) St. Clair Adams, Attorney for Appellant.

[fols. 149-153]

CLERK'S CERTIFICATE

Clerk's Office

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, do hereby certify that the foregoing 148 pages contain and form a full, true, complete and perfect transcript of the record, assignment of errors and all proceedings in the case of United States ex rel. B. I. Salinger, Jr. versus Victor Loisel, United States Marshal, 17,233 of the Docket of this Court, as made up in accordance with Præcipes for Transcript copied therein.

Witness my hand and the seal of said court at the City of New Orleans, La., this 21st day of May, A. D. 1923.

H. J. Carter, Clerk. [Seal of the U. S. District Court for the Eastern Dist. of La., N. O. Div.]

Citations and Services omitted in printing.

Endorsed on cover: File No. 29,646. E. Louisiana D. C. U. S. Term No. 341. B. I. Salinger, Jr., appellant, vs. Victor Loisel, United States Marshal for the Eastern District of Louisiana. Filed May 24th, 1923. File No. 29,646.

Office Supreme Court, U. S.

FILED

DEC 10 1923

WM. R. STANSBURY

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

Two Cases, Nos. 341, 342.

B. I. SALINGER, Jr., APPELLANT,

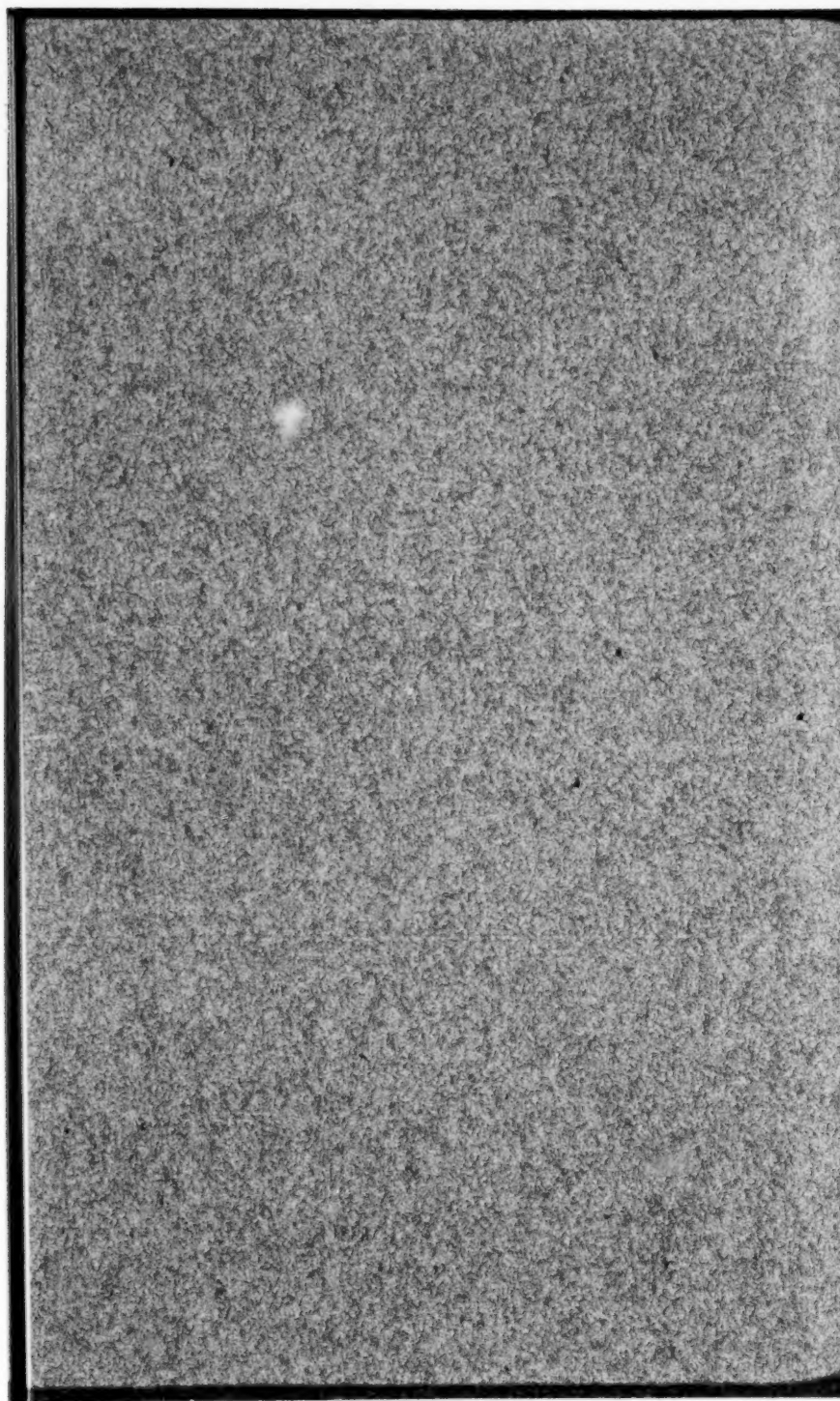
versus

**THE UNITED STATES OF AMERICA AND VICTOR
LOISEL, AS UNITED STATES MARSHAL, EASTERN DIS-
TRICT OF LOUISIANA, APPELLEES.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.**

**PETITION OR MOTION OF B. I. SALINGER, JR., FOR
RELIEF, IN AID OF HIS RIGHTS CREATED BY
SUPERSEDEAS AND BAIL OBTAINED IN CAUSES
NUMBERS 341 AND 342 OF SAID TERM, AND TO
STOP INTERFERENCE WITH THE JURISDICTION
OF THIS COURT.**

B. I. SALINGER,
Attorney for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

Two Cases, Nos. 341, 342.

B. I. SALINGER, JR., APPELLANT,

versus

THE UNITED STATES OF AMERICA AND VICTOR
LOISEL, AS UNITED STATES MARSHAL, EASTERN DIS-
TRICT OF LOUISIANA, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES,
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SUPERSEDEAS AND BAIL OBTAINED IN CAUSES
NUMBERS 341 AND 342 OF SAID TERM, AND TO
STOP INTERFERENCE WITH THE JURISDICTION
OF THIS COURT.**

To the Honorable

The petition of B. I. Salinger, Jr., of Sioux City, Iowa, respectfully shows:

From the 27th day of April, 1923, there have been pending in the Supreme Court of the United States the above entitled and numbered appeals. Both of them present the

single ultimate question whether petitioner may lawfully be removed from the district of Louisiana to the district of South Dakota because of a certain indictment returned against him in the district of South Dakota and charging misuse of the mails in violation of Section 215, Penal Code.

In each of said appeals there is an order that they shall operate as a *supersedeas*, and in each there is ordered and given "an undertaking in the nature of a *supersedeas* bail bond." Though these appeals are still undecided and said order of *supersedeas* and the said bail bonds still subsist, various persons, among them S. W. Clark, U. S. attorney for the district of South Dakota, and judges and courts hereinafter named, have been and are proceeding against petitioner and restraining and imprisoning him as if there were no such undecided appeals, *supersedeas* orders, or bail bonds, to wit:

An indictment, numbered 983, was returned against petitioner *in the district of South Dakota*. It accuses him and two others of said violation of Section 215, Penal Code, but has no conspiracy count. Though returned in South Dakota its only material fact allegation is that letters were mailed *in the northern district of Iowa*, to wit, letters addressed and delivered to addressees in the *southern* division of the district of South Dakota. Despite that, and in violation of Section 53, Judicial Code, said indictment was returned in the *western* division of said district, and, in violation of said statute, a transfer was made from said western division to said southern division *on the application of the Government*, though if there be power to make transfer at all except *out of* the division of alleged commission, it must, under said Section 53, be *on the application of the defendant*.

Such proceedings were had under said indictment as required petitioner to execute a bond to appear to said indictment in the said southern division during its April term in 1923. Between the execution and delivery of said bond and the first day of said April term, and while petitioner was in New Orleans, the sureties on his said bond surrendered him to a United States commissioner, who thereupon exonerated said bond and committed petitioner to the custody of the marshal. Later, under Section 1014 R. S., demanding the removal of petitioner to the said southern division, was lodged before said commissioner, and on that complaint he committed petitioner to the marshal to be held for removal. Thereupon petitioner sued out and obtained two writs of *habeas corpus* in the District Court of the United States for the Eastern District of Louisiana to test each of said two commitments. The attacks upon each of said commitments are identical (and are more fully set forth in another connection).

Said District Court considered both writs in a single hearing. During this hearing, and on April 20, 1923, the Government made oral request for a warrant of removal and one was then signed. Nothing was then done to execute the order. At the conclusion of said hearing, to wit, on April 26, 1923, said court discharged each of said writs and in each of said *habeas corpus* proceedings remanded petitioner to the custody of the marshal.

On April 27, 1923, said court allowed an appeal to the Supreme Court of the United States as to each of said judgments of remand. Its order in the premises was in words and figures as follows, to wit:

"It is ordered that an appeal be allowed from the judgment of the court (naming it) to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served, and returned in accordance with law. And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States; that to effect said *supersedeas* said B. I. Salinger, Jr., "shall give approved bond in \$100 conditioned that" he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good; and shall further enter into an undertaking *in the nature of a supersedeas bail bond* in the penal sum of \$15,000 (sureties to be approved) conditioned for the appearance and surrender of said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said court and not depart the same, in the event the order being reviewed in these proceedings shall be affirmed."

On the same day, to wit, on the 27th day of April, 1923, petitioner executed the bonds as above required, including two undertakings "in the nature of a supersedeas bail bond," conditioned as above required, said bonds being \$15,000 in one of the said appeals and \$5,000 in the other. The conditions of said bail bonds are that the obligor

"shall be and appear before the said Supreme Court of the United States at and during the present term thereof and from day to day thereafter and shall be and appear before the said court at the next regular or special term thereof on the first day thereof and term to term thereafter until finally discharged therefrom and shall abide the order and judgment of said

United States Supreme Court and not to depart the court without leave, and shall further abide by and obey all orders made by the said Supreme Court of the United States in this cause, and shall surrender himself in execution of the judgment appealed from as said court may direct if the judgment of said United States District Court, Eastern District of Louisiana, New Orleans, in this cause, shall be affirmed by the Supreme Court of the United States."

Citation was issued and served, both in due time and manner.

On said single ultimate question whether accused might lawfully be removed because of the said South Dakota indictment, there are involved the following propositions, among others:

On the authority of *Stever's case*, 222 U. S., 167, none but the northern district of Iowa has jurisdiction to prosecute.

On the authority of the *Post case*, 161 U. S., 583; *Beaver's case*, 194 U. S., at top 85; *Paul's case*, 148 U. S., 107, 121, and *Chenault's case*, 230 Fed., 943, an indictment returned in one division that charges offending in another is a nullity which cannot base a removal, and that this is true for the further reason that Section 53 of the Judicial Code commands that all "prosecutions" must be had in the division of commission.

There is no jurisdiction to remove to the southern division of South Dakota because not only was there no jurisdiction to return the indictment in the western division, but no power or jurisdiction to transfer for prosecution to said southern division—this, because the transfer was made on the application of the

Government, though said Section 53 permits transfer only on the application of the defendant.

In so far as two certain decisions by the Circuit Court of Appeals of the Eighth Circuit may run counter to the decisions of the Supreme Court above referred to, said circuit decisions should not be followed because they are opposed to the said Supreme Court decisions which they do not so much as mention; that one of said circuit decisions has the further vice of being a bald *dictum*, that the other is utterly violative of reason, and that neither asserts or has the slightest support in authority.

It is the undisputed testimony that neither defendant named in said indictment was in the District of South Dakota at any material time mentioned in said indictment.

On April 26, 1923, the court discharged the two writs involved in the appeals to this court and ordered remand. On the same day the judge of the court ordered the said removal warrant signed on April 20th to be executed.

On the 27th day of April, petitioner perfected the said two appeals but, despite that fact, the removal was about to be proceeded with.

To resist this, petitioner, on April 17, 1923, sued out a third writ of habeas corpus in said District Court to prevent such removal. Such third writ issued on April 27th, and the proceeding thereon was set for hearing and was heard on April 28, 1923, a day after said two appeals to this court had been perfected. On the same day the court dismissed said third petition and writ and again ordered the removal, despite the said appeals. But, finally, the court gave a short time wherein to obtain relief, if any might be had, from the Circuit Court of Appeals of the Fifth Circuit. There-

upon, the senior judge of said Circuit Court of Appeals was applied to to grant and did allow an appeal in the premises. He exacted a bail bond to abide the orders of said Circuit Court of Appeals, which bond is more fully described in another connection.

While said three appeals were pending, petitioner was in Chicago, Illinois, with permission of the said District Court of Louisiana. While in Chicago, one Fred R. Briggs, a representative of the Department of Justice, lodged complaint against him under Section 1014 R. S., and before a United States Commissioner. The complaint said nothing about the pendency of either of said appeals or of supersedeas or bail. In all the proceedings heretofore narrated, petitioner was constantly put to the burden and expense of obtaining appearance bonds as well as the said three bail bonds. Before the Chicago Commissioner an appearance bond of \$25,000 was exacted.

On hearing, Commissioner being made aware of said appeals, supersedeas and bail bonds, discharged petitioner. Thereupon one James A. O'Callaghan, the attorney who represented the Government before the Commissioner, at once filed another complaint under section 1014, without mention of any of said appeals, supersedeas orders or bail bonds therein.

This information was laid before Hon. J. R. Wilkerson, judge of the United States District Court for the eastern district of Illinois.

In the beginning the judge declared:

I must say it appears to me on the papers before me the Commissioner did not err. I have intimated, I think, that this Court is without jurisdiction in

view of the pendency of the identical question in the Circuit Court of Appeals for the fifth circuit, which is undecided. That is my view now. I have told counsel I would hear arguments on it. Under these circumstances I would hesitate to require defendant to give any further bond.

There is another suit pending, involving the question you are raising here. The question at issue is the right of the United States to take this defendant to South Dakota for trial, isn't it?

O'CALLAGHAN: That is the question.

COURT: That question is pending in another court, isn't it?

O'CALLAGHAN: Yes. As I understand it, it is pending now in the Circuit Court of Appeals of the 5th Circuit.

COURT: Suppose you get an appeal to our Circuit Court of Appeals and Judge Baker gives you a super-sedeas and I grant permission for you to leave the district and you go home. While pending in our C. C. A. has the marshal a right to seize you in Omaha and subject you to removal proceedings again?

O'CALLAGHAN: Yes.

COURT: In other words, the question is: may they seize you in every district notwithstanding you have pending a case in which the question of a right to be removed at all is pending?

O'CALLAGHAN: I will answer that by saying if he has a right to go into all the courts, the United States surely has the right to go into all districts.

COURT: It would be really intolerable if removal proceedings could be brought in every district.

At this point Judge Wilkerson was advised of the pendency of the two Supreme Court appeals and the super-

sedeas therein; and was told by counsel for petitioner that if said judge could now take from the Supreme Court of the United States the decision of a pending case involving the very question pending in the instant removal case, then no reason existed why during the very hearing in Chicago another judge might not proceed with new removal proceedings. Thereupon, the judge discussed as to what might happen if it were assumed there was some irregularity in the Supreme Court proceedings and in that connection said:

However, of course if the Supreme Court decides he should not be removed that ends the matter. That is binding on every court.

Why should not this proceeding be permitted to stand until a reasonable opportunity to get a decision from the Supreme Court? In such a case as this, there is no doubt in the world that on that matter being brought before the Supreme Court they would expedite the case and decide it in two weeks. If there is a supersedeas to the Supreme Court, you can certainly get to the Supreme Court. But I am not going to dismiss this proceeding here from this jurisdiction. The question is whether I will hold it up until the Supreme Court has decided this case, and I will say frankly I am very much inclined that way.

At this point, about October 5, 1923, the judge changed his original position that he would not feel justified in requiring further bond and exacted and obtained an appearance bond in the sum of \$10,000. Assurance was given the Court at this time that if an adjournment were granted the attorneys for the Government would attempt to dismiss said two appeals in this court, and opinion was expressed that they would be able to do so. Adjournment was granted to

October 29th, to enable them to sustain that opinion. When that time arrived nothing had been done toward dismissing said appeals. The judge thereupon gave until November 28, 1923, to get rid of the Supreme Court appeals, if that might be done. On the last named date nothing had still been done as to the obtaining of a dismissal. This time the judge adjourned the matter to December 10, but directed the attorneys representing the Government to telegraph the attorney general to ascertain what his intentions were as to seeking dismissal.

At this writing, December 8, 1923, nothing has still been done towards obtaining a dismissal of said appeals—and a motion to dismiss could have been made any time since May 24, 1923, when the record was lodged in this court.

While these proceedings were being had in Chicago, some representative of the Department of Justice attempted to apprehend petitioner in New York City, believing petitioner to be there.

The submission of the appeal in the said Circuit Court of Appeals was set for December 3, 1923. Petitioner was under bond to appear in that court at that time and, as seen, was also held to appear before Judge Wilkerson.

The bond exacted by the Circuit Court of Appeals was conditioned that this petitioner

Should appear on the first day of its next term held in New Orleans and from then on until finally discharged; that he should abide by and obey all orders made by said Court in said appeal; that he should surrender himself in execution of judgment and sentence appealed from as said court may direct "if the judgment and sentence of the said District Court against him shall be affirmed" by said Circuit Court of Appeals.

He applied to Judge Wilkerson for permission to meet his obligation to appear in the Circuit Court of Appeals, and the application was denied. The reason assigned was that the judge had no authority to act beyond his district and that it was an absurdity to claim that the physical presence of petitioner was required at the hearing in the Circuit Court of Appeals. He added that all he was concerned with was that petitioner be in Chicago when December 10th arrived.

Petitioner appeared in said Circuit Court of Appeals at New Orleans on December 3rd, and was personally present in said Court during the argument and submission of his appeal therein.

Petitioner in nowise breached the conditions of his said bond. On said 3rd day of December the said Circuit Court of Appeals was advised on the oral argument of the pendency of said two appeals and the existence and effect of appeals with supersedeas, and that these things did exist, and their effect is elaborately presented in the record and brief in said appeal in said court; and counsel for the Government went so far as to say that any interference with the said two appeals was something for the Supreme Court to take care of.

Notwithstanding, said Court without notice, evidence or hearing, and while petitioner was in Court as aforesaid, made the following order:

UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FIFTH CIRCUIT

**Order Committing Appellant to Custody Pending
Determination of Case.**

Extract from the Minutes of December 3rd, 1923.

No. 4088.

B. I. SALINGER, JR.,

versus

THE UNITED STATES OF AMERICA and VICTOR LOISEL,
as U. S. Marshal, Eastern District of La.

It is ordered that a commitment issue herein committing B. I. Salinger, Jr., appellant herein, to the Parish Prison of the Parish of Orleans, State of Louisiana, at New Orleans, La., pending the determination of the above entitled and numbered cause.

And petitioner is now in prison under said commitment and oral command of said court that the marshal take him at once into custody.

Your petitioner is unjustly and unlawfully detained and restrained of his liberty by, and is now in the custody of, Victor Loisel as United States marshal of the Eastern District of Louisiana.

Said detention and restraint is not by virtue of any final judgment of any court of competent jurisdiction, either Federal or State; and as to the said imprisonment and detention, no other application than this has ever been made.

That to the best of the knowledge, information, and belief of your petitioner, the pretense for his said detention is that said marshal claims the right to hold and imprison him by virtue of said order of commitment of date December 3, 1923.

The said Circuit Court of Appeals was without jurisdiction to make any order whatsoever in the alleged appeal pending in it; and if it be assumed it did have jurisdiction of said appeal, the said order of commitment is an act beyond the jurisdiction of said court and is violative of law and of the rights given petition by the Constitution of the United States. This, first, because said commitment was ordered without notice, evidence or hearing; it was in violation of bail bond exacted by said court and which petitioner in nowise breached; third, because when said alleged appeal was perfected in said Circuit Court of Appeals, the Supreme Court of the United States had already taken full jurisdiction of the matters presented by said appeal and was still retaining, and to this day retains, such full jurisdiction—and said commitment is also in violation of the supersedeas granted in two appeals now pending in the Supreme Court, and which appeals are the ones by which the Supreme Court had obtained said full jurisdiction at the time the said alleged appeal to said Circuit Court of Appeals was perfected.

Rule 33 of the said Circuit Court of Appeals provides that pending an appeal from the final decision of any court or judge discharging the writ of *habeas corpus* after it has been issued the prisoner shall be remanded to the custody from which he was taken by the writ or shall for good reason shown be detained in the custody of the court or judge, or be enlarged upon recognizance.

The rule further provides that where the appeal is pending from a declination to grant the writ the custody of the prisoner shall not be disturbed. As seen, this petitioner had been enlarged upon recognizance under order of the senior judge of said Circuit Court of Appeals; therefore the said commitment treated petitioner precisely as if he had not given bail as directed or had in some manner breached it, or as if, instead of having obtained the writ and having had a hearing thereon, the application for the writ had been denied.

On the closing argument for petitioner, it was declared from the bench that even if it should be held that a former application in another circuit and its denial there did not work an adjudication against petitioner, a repetition of the application might constitute a misuse of the writ.

On response that the court to whom the second application was made was not bound to grant the writ and that on refusal of the writ custody would remain undisturbed, which would end any chance to misuse the writ, it was responded from the bench, speaking of the commitment aforesaid, that it was sure petitioner would not make any further repetition of an attempt to obtain a writ of *habeas corpus*.

Said remarks from the bench indicate that if there be an affirmance petitioner would not be enlarged on bail, but would have to submit to immediate removal on the order of the District Court, and that he was being summarily imprisoned so there might be no possibility of further offense consisting of availing himself of the right given him by law to appeal to other courts as long as the order against him was one that he be remanded.

In no return that was made in the said three *habeas cor-*

pus proceedings was there any affirmative plea, and no pleas in the nature of any estoppel or avoidance, and said return consisted of nothing but admissions and denials of the allegations of the petitions in *habeas corpus*.

In further support hereof reference is made to the record in said two appeals and to the affidavit hereto attached.

By reason of the foregoing, petitioner respectfully urges that he is unlawfully detained and restrained of his liberty and about to be deprived of the benefit of his appeals herein, and prays that writs of *habeas corpus*, *certiorari*, injunction or other lawful writ be granted to the end that the interference with the jurisdiction of the court herein complained of and any others may be prevented and for such other writ or relief as may be proper or necessary in the premises.

B. I. SALINGER, JR.,

By ————,
His Attorney.

DISTRICT OF COLUMBIA, ss:

Personally came and appeared before me B. I. Salinger, who being duly sworn upon his oath deposes and says that he is counsel for B. I. Salinger, Jr., the petitioner named in the within petition; that said petitioner is now in prison in the custody of the United States marshal for the Eastern District of Louisiana; that affiant is making this affidavit under authority given him by said petitioner and because, owing to his imprisonment, the petitioner is unable to do so himself; that affiant has read the foregoing petition and knows the contents thereof, that with exception later stated, he has personal knowledge of the fact allegations therein contained, either by personal examination of court records involved or by being personally present when matters set

forth in the petition occurred; that as to the allegations as to what occurred in Chicago and in New York City, and the conduct of Clark, affiant has been credibly informed, and so he verily believes that the occurrences alleged to have taken place are as stated in this petition; he deposes further that no previous application for the writ of *habeas corpus* on account of detention and imprisonment complained of in the foregoing petition has been made—and he says all the matters alleged in the petition are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this 8th day of December, 1923.

_____,
Notary Public, D. C.

My commission expires June 13, 1927.

Certificate of Counsel.

The undersigned, attorney for appellant and petitioner, certifies that he is a member of the bar of this court; that this application is made in good faith; that said appeals were taken in good faith and not for purposes of delay; that the third *habeas corpus* proceeding order was made on April 28, 1923; that the record herein was lodged by petitioner on May 24, 1923; that petitioner has made every effort to have the said lodged record printed promptly.

And the undersigned is authorized by the petitioner to say petitioner is willing to have the hearing of said appeals advanced, and stands ready to make argument promptly as soon as he can obtain a printed copy of the record.

Office Supreme Court, U. S.

FILED

DEC 10 1923

WM. M. STANSBURY

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

Two Cases, Nos. 341, 342.

B. I. SALINGER, Jr., APPELLANT,

versus

**THE UNITED STATES OF AMERICA AND VICTOR
LOISEL, AS UNITED STATES MARSHAL, EASTERN DIS-
TRICT OF LOUISIANA, APPELLEES.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.**

BRIEF

**ON PETITION OR MOTION OF B. I. SALINGER, JR.,
FOR RELIEF, IN AID OF HIS RIGHTS CREATED
BY SUPERSEDEAS AND BAIL OBTAINED IN
CAUSES NUMBERS 341 AND 342 OF SAID TERM,
AND TO STOP INTERFERENCE WITH THE JU-
RISDICTION OF THIS COURT.**

B. I. SALINGER,
Attorney for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

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B. I. SALINGER, JR., APPELLANT,

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RISDICTION OF THIS COURT.

I.

Petitioner has two appeals pending here. They test whether anyone, anywhere, by any means whatever, may lawfully have him removed because a certain indictment exists. That these appeals are not frivolous is demonstrated

by what the application here shows the major basis of appeals to be. One glance at that showing and any examination of Stever's Case, 222 U. S., 167; Post's Case, 161 U. S., 583; Beaver's Case, 194 U. S., at top page 85; Paul's Case, 148 U. S., 107, 121; Tinsley, 205 U. S., —; and of Section 53 Judicial Code will convince that, at the least, these appeals raise serious and substantial federal questions.

Be that as it may, no attempt has been made to dismiss; and under *Shipp's* and many others this Court alone may say whether or not the appeals are substantial—and no one other than this Court can pass even on whether it has jurisdiction to entertain these appeals. So long as they remain here no one may interfere with their effectiveness by deciding for himself that they do not deserve to be treated as appeals in which there might be an effective decision. That is a truism. If this be not so, the jurisdiction of this Court exists only on sufferance.

What interference is there? The appeals order that they operate as a supersedeas. Supersedeas bail bonds have been given. This works a command that petitioner shall not be put in custody, and of course shall not be removed until said appeals are decided here. Individuals, judges and courts are now promoting and entertaining proceedings to remove petitioner under the very indictment which is involved in said appeals; they are compelling petitioner to give appearance bonds in such proceedings, and one court has actually imprisoned him. All this, though each of these knew that this was being done while this court has for decision whether petitioner shall ever be removed under said indictment, and while they knew also that there exists an order of this court which enlarges petitioner pending final decision

of said appeals. If that is permissible, the Shipp case, 203 U. S., 563, and the Jones case, 226 U. S., 148, that follows the Shipp case, no longer rule. If they are still regnant, they settle that no such interference is permissible.

True, the Shipp case deals with murdering appellant, pending his appeal. But that is adventitious. This court did not punish the murderer, but did punish because the murdering made ineffective the pending appeal of the victim. There would have been punishment if something other than lynching had made said appeal ineffective in whole or in part.

It cannot matter what agent or what acts on his part interfere with the appellate jurisdiction; the sole question is whether there is interference. Wehrman, 177 Iowa, at 549, 550; Goodard, 94 U. S., 672; Noyes, 121 Fed., C. C. A., 209.

That must be so. Interference is interference. The method is not the same in any two cases. The agent, as well as the act differ. There can be no hard and fast rule as to the relief the appellate court may give. It may be an order to refrain from acting or to abandon action already had, or both. The right and power to stop the interference, if substantial, must be so elastic as to reach whoever interferes and to reach whatever method is used to interfere. Wehrman, 177 Iowa, 549, 550.

Neither the agent nor the act are material. If a court or judge had ordered or in some way facilitated the lynching in Shipp's case they would have been dealt with as Shipp was. If some court or judge now enjoined petitioner, say, from expending any money to prepare his argument in these appeals, surely this court would not be powerless to

obtain adequate presentation by the appellant because the enjoining was the act of a court or judge.

II.

Just a glance as to the consequences should this court decline to interfere. Though petitioner is ordered enlarged by reason of the *supersedeas* in his two appeals and because he has given said *supersedeas* bail bonds, Judge Wilkerson is entertaining removal proceedings and has exacted an appearance bond. The Circuit Court of Appeals of the Fifth Circuit has imprisoned petitioner during the pendency of his appeal in that court. To say nothing of the fact that said Court of Appeals has no jurisdiction because it is acting, and always has acted, on the very matter that this court has taken jurisdiction of, it is manifest what may happen. If that Court of Appeals shall affirm, petitioner will at once be removed under said indictment under the order of the District Court of Louisiana. Or the imprisonment pending decision may be for a long time, depending upon the time when the Circuit Court of Appeals will enter a decision—and rather than suffer indefinite imprisonment petitioner may be driven to consent to immediate removal. So it may well happen that before the decision of the appeals pending here can be had, and which will decide whether he is to be removed at all, he has already been removed, or, for that matter, tried and been either acquitted or convicted.

Removal pending the decision of these appeals here is therefore manifestly an irreparable injury.

Suppose the decision here should be that there ought to be no removal. It may come at a time when petitioner has already borne the burden and expense of a trial under this

indictment, and when he may be confronted with the further burden of an appeal to this court from a conviction—an appeal that would raise the very questions now pending in this court.

More—the great question in the pending appeals is whether the South Dakota court has jurisdiction. Should it be decided here that such jurisdiction is lacking, then if before that, there is a trial in South Dakota, petitioner will bear the burden of a proceeding in which neither conviction or acquittal would be a bar to a new indictment for the same offense. If there is no jurisdiction to try, no adjudication can be worked by the outcome of the trial.

Only the most outstanding points have been discussed. It is not amiss to add something more on the burdens petitioner is being made to suffer, and, if there is no relief here, must continue to suffer. What has been done to him now may be repeated again and again—and no one could endure this without being broken down physically and financially. Take just one illustration: The record makes plain that had he not appeared at New Orleans he would have been proceeded against by the Circuit Court of Appeals, including the forfeiture of his bond. He did go there, and no one can say, in view of what has already been done by him, what Judge Wilkerson may do, including bond forfeiture, when petitioner fails to be in Chicago on December 10th.

III.

Authorities for the following propositions:

On the power of this Court to intervene and how it may intervene:

Ex parte Milwaukee, 5 Wall. at 190; Hudson, 156 U. S., 277.

Merimac, 219 U. S., 52; Goddard, 94 U. S., 672.

Mayer, 235 U. S., —; Noyes, C. C. C., 121 Fed., 209.

Wehrman, 177 Iowa, at 542, 549, 550.

On mailing being still the gist of the offense under Section 215 as amended:

Badders, 240 U. S., 393, 394; Olsen, C. C. A., 287 Fed., —.

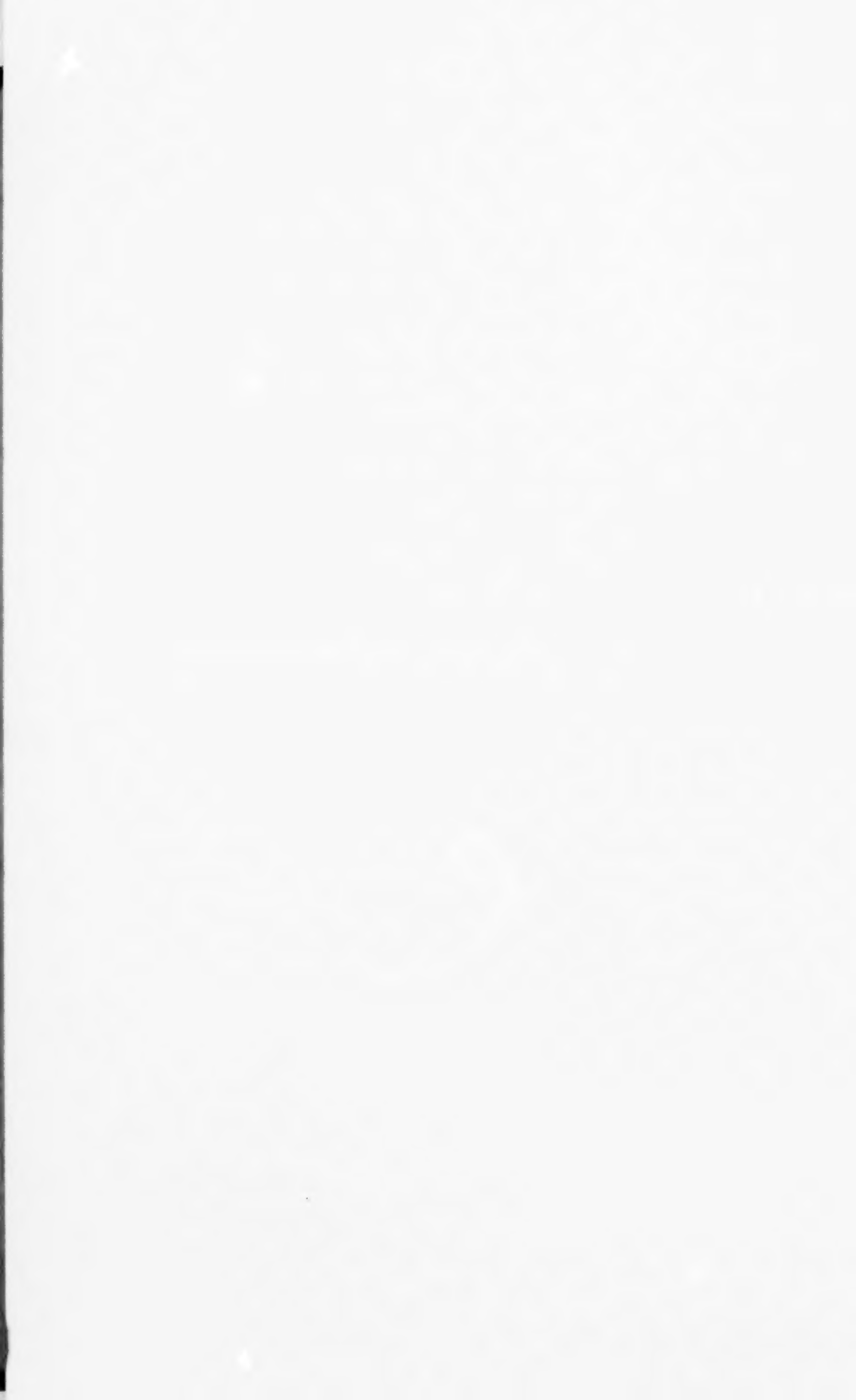
That in the Federal courts a remand in *habeas corpus* is no adjudication.

Ex parte Kain, 3 Latch., page 3; Carter, 105 Fed., 614, 616; Graves, 270 Fed., —.

For the statement of the balance of convenience rule see pronouncement of Taft, J., in the Addyston Pipe and Tile Case. The application of that rule here is that no harm can come to the Government if it is made to keep hands off until this court decides the appeals, and irreparable injury will come to petitioner if the practices heretofore indulged in are permitted to be continued or repeated.

Respectfully submitted,

B. I. SALINGER,
Attorney for Petitioner.



JAN 9 1924

WM. R. STANS

CL

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

Nos. 341-342

B. I. SALINGER, JR., APPELLANT,

vs.

**VICTOR LOISEL, UNITED STATES MARSHAL FOR
 THE EASTERN DISTRICT OF LOUISIANA, *et al.*,**

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
 EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR APPELLANT.

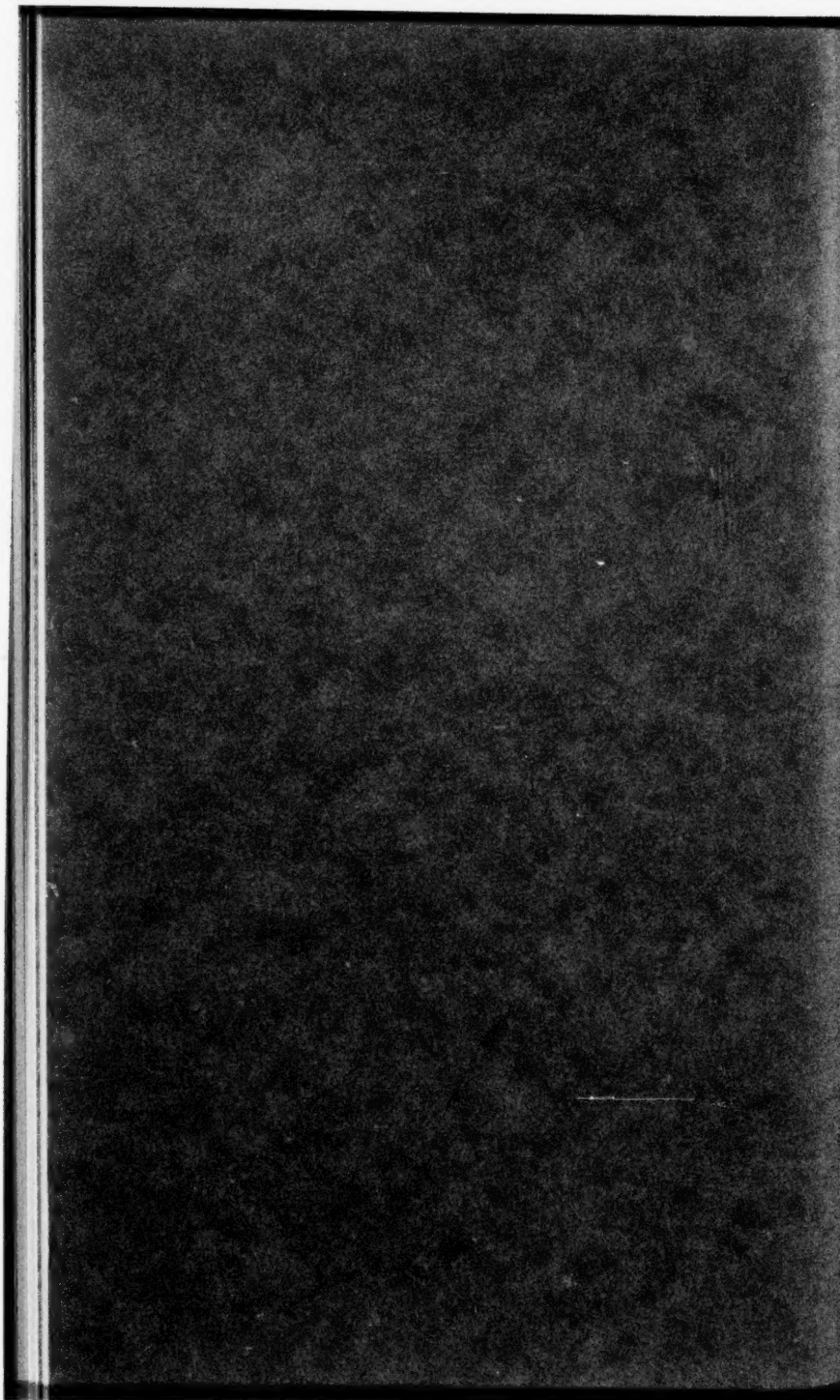
B. I. SALLINGER,

Attorney for Appellant.

ST. CLAIR ADAMS,

L. H. SALLINGER,

On Brief.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

B. I. SALINGER, JR., APPELLANT,

vs.

VICTOR LOISEL, UNITED STATES MARSHAL FOR
THE EASTERN DISTRICT OF LOUISIANA,
et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA.

STATUS.

No. 341 and No. 342 are here argued. They involve resistance by habeas corpus to an attempt to remove appellant to the District of South Dakota to answer an indictment there returned which charges violation of Section 215, Penal Code. A bond was given that appellant would appear before the District Court of the United States for that district at its then next sitting at Sioux Falls. The sureties surrendered appellant while he was in New Orleans to a United States Commissioner there and thereupon that officer placed appellant in the custody of the respondent marshal. Upon this, appellant obtained a writ of habeas corpus from the District Court of the United States for the Eastern District of Louisiana. He gave bond to appear at hearing in that court.

A few days later complaint under Section 1014 R. S. and based on said indictment was lodged with said commissioner, and thereunder that officer once more put appellant in the custody of said marshal. A second writ was obtained from said District Court. The two habeas corpus proceedings are, respectively, 17233 and 17238 on the docket of said court. The two proceedings were submitted on a single hearing and the resistances are identical, but there was no consolidation. Both writs were dismissed. Hence, the appeals in Nos. 341 and 342. In both cases said District Court allowed appeals to this court with order that the appeal operate as a *supersedeas* upon the giving of an appeal bond and another "in the nature of a supersedeas bail bond." Both were given as ordered. Despite that said appeals had been perfected, the judge of said court ordered removal. Thereupon a third writ was obtained of said court, and that proceeding is No. 17242. The resistance in this last is identical with that in the first two, except that in the last there was added the complaint that the perfecting said two appeals left the judge without authority to order removal during the pendency of the appeals. This last writ was also dismissed and appellant was put in custody of said marshal. Appellant then obtained allowance of appeal and a supersedeas from the Circuit Court of Appeals of the Fifth Circuit. That appeal has been heard and an opinion filed dismissing said third writ. The said appeal has been removed here by certiorari and in number 705.

NOTE: As the printed transcript in number 342 contains nearly all the record in numbers 341 and 705, page references are to the transcript, in No. 342 unless otherwise specified.

STATEMENT OF THE CASE.

Said indictment was returned on March, 1922, in the Western Division of said District, and names appellant and two others. The joint action is charged by stating as a conclusion that "defendants" mailed and caused to be mailed.

Appellant appeared before a United States Commissioner in Des Moines, Iowa, and gave bond that he would appear and answer said indictment at the opening term of said court at Sioux Falls, on October 17, 1923, at a term that was to begin on that day. For reasons that do not appear in this record, he did not appear in Sioux Falls on said day. On the 20th day of that month, he was in New York City. There, a proceeding under Section 1014 R. S. to remove appellant for trial to Sioux Falls in the Southern Division of said district was instituted. A Commissioner ordered that appellant be held for such removal.

Application for a warrant of removal was made to the District Court of the United States for the Southern District of New York. At this point appellant obtained a writ of habeas corpus from said court in which and on the hearing of which he resisted said removal on grounds that will be elsewhere fully stated. Said court dismissed the writ. Appeal was taken to the Circuit Court of Appeals of the United States for the Second Circuit. It affirmed and sent down its mandate. To avoid removal appellant gave bond that he would appear and answer in said Southern Division at its term to be held in April, 1923.

Between the giving of said bond and the said opening

time of the said April term said surrender to Commissioner was made, and said two habeas corpus proceedings now Numbers 341 and 342 were determined by the court sitting in Louisiana.

The assignment of errors made in the appeal to the Circuit Court of Appeals of the Second Circuit, the assignment made in each of the said two appeals from the action of the District Court of Louisiana, and the assignment made in the appeal to the Court of Appeals of the Fifth Circuit are identical, except as herein later differentiated. One difference is that in addition to what is presented in the other three appeals, to wit: the one in the Second Circuit and the two from the action of the District Court of Louisiana, and the assignment in the Circuit Court of Appeals of the Fifth Circuit, is that the latter, in addition to what is presented in the other three, has the question whether the District Court of Louisiana erred in holding by its dismissal of the last habeas corpus proceedings brought in said District Court, that it could execute said removal warrant after the first two appeals to the Supreme Court had been effected.

The only matters of difference between the record in Numbers 341 and 342 and the one in 705 is that the last has the question as to right to remove during the pendency of 341 and 342. The proceedings in New York do not have that question.

Another difference is that in the proceedings in New York the conclusion of the indictment that anything had been done by defendant in South Dakota was met by no affirmative testimony, while in the Louisiana proceedings said conclusion of the indictment was met by undisputed testimony that at no material time mentioned was either defendant in South Dakota (and there is no conspiracy count).

The questions for decision are these:

1. Where the only fact charge is a mailing in Iowa and delivery in South Dakota, has Dakota jurisdiction?

2. Should there be removal when the testimony is that accused was at no material time in the demanding district and same is not disputed except by a conclusion of the pleader put into the indictment?

3. Does Section 53, Judicial Code, permit indictment in one division when the charge is that the offense was committed in another division.

4. As said statute permits transfer from division to division on application by the defendant is there power to make such transfer on the application of the Government?

5. May removal be based on an indictment which states the naked conclusion that described letters were mailed with intention to aid the scheme set forth, when these letters show they were written to those who then had already been defrauded, if defrauded at all?

6. Does an indictment charging the use of the mails with intent to effectuate a fraudulent scheme to obtain money for stocks, with intent to defraud, charge any offense where it says nothing as to whether or not the stocks were worth all that was intended to be got or was gotten for them?

7. If the indictment is so framed as that it seems clear to the authorities acting in the removal proceedings, *in limine*, that demurrer will be sustained to it or that it will be quashed on motion—are these authorities to find probable cause and to order removal, though they believe on the exercise of a judicial function, that not only can there be no conviction but that there cannot even be a trial?

8. Is an indictment which is so confused and needlessly prolix and involved as that it does not fairly apprise the accused of what charge he is to meet and what he must do to meet it, not a violation of the Constitutional guarantee that he shall be thus apprised?

While we deny that there are any other questions, it is possible that respondent may urge the following additional ones:

1. May habeas corpus be used to try out said eight questions?

2. Should not the decision of the New York courts be held to be an adjudication against appellant?

3. Did not the giving of said appearance bond work either that the obtaining said writs in Louisiana is an abuse of process, or work an estoppel by waiver or some other estoppel?

As the decision in what is now No. 341 and No. 342 is a naked dismissal, and as such decision is presumed to be on the substance rather than on matters in abatement, and as no issue was joined on either of said three points, it is, to say the least, doubtful whether these points arise on the record of said appeals. But the record in No. 705 gives some slight color for claiming that said three points or some of them were considered by the court. Therefore we shall make the argument on these points in No. 705,—and ask same to be treated as if also made in No. 341 and No. 342.

While it may be it should be held that Circuit Court of Appeals for the Fifth Circuit sustains the lower court, we do not argue that in No. 705, because we do that fully in the argument in 341 and 342—and we ask that such argument be deemed repeated in No. 705.

SPECIFICATION OF ERRORS.

I.

Since the indictment has no fact allegation except that the mailing was done in Iowa and that what was then mailed was delivered in South Dakota, and has nothing more than the conclusion that accused caused delivery in South Dakota according to address—it was error to dismiss the writ and so to hold that the District of South Dakota has jurisdiction.

II.

It was error so to hold where it was the unimpeached testimony that at no material time was either defendant in South Dakota,—and there being nothing to dispute such testimony except possibly a conclusion of the pleader to the contrary.

III.

The court erred in holding that despite the provision of Section 53, Judicial Code, that prosecution should be had in the division wherein it is charged the offending was done, that the indictment was valid though returned in a division as to which no offending is charged.

IV.

It erred in holding that appellant might lawfully be removed for trial to Sioux Falls in the Southern Division on the transfer from the Western Division where the indictment was returned,—such transfer being on application by the Government, though Section 53 Judicial Code has no provision for transfer except on application of

the defendant,—defendant never having moved a transfer.

V.

It erred in holding there might be removal on an indictment which so far from showing that any letters were mailed in execution or attempted execution of the scheme alleged showed affirmatively that they were addressed to stockholders who had already parted with their money when the letters were mailed and who had then already been defrauded, if defrauded at all,—erred in holding that there could be an execution or attempt to execute what was already executed.

VI.

The court erred in holding that there might be a removal on an indictment which charged no offense in that it omits the essential allegation that the stock charged to have been sold to effectuate the scheme alleged was not worth all that the buyer paid for it,—the indictment thus being left without any allegation exhibiting intent to defraud.

VII.

It erred in holding there might be a removal upon indictment from which it appears that removal would be idle, for in that the indictment is in such condition that if there was a removal it was apparent that there would be no trial, much less a conviction, because the indictment was such as that demurrer to it must be sustained or that it must be quashed on motion.

VIII.

It was error to base a removal on such an indictment because the same is so confused, needlessly prolix and involved as that it does not meet the command of the Constitution that an indictment must fairly apprise the accused of what charge he is to meet and what he must do to meet it.

IX.

The court erred in holding (if it did so hold) that habeas corpus may not be availed of as to the matters complained of by appellant.

Grand Division I.

The Demanding Court and District (South Dakota) Have No Jurisdiction to Indict or Try This Appellant, Because the indictment Has No Material Fact charge Except That a Letter Mailed in Iowa Was Delivered in South Dakota. It Is Stare Decisis That This Is So, Though the Indictment Charges Both Deposit and a Causing of Delivery.

Part 1-a.

IT IS STARE DECISIS THAT, UNDER THE INDICTMENT AT BAR, THERE IS NO JURISDICTION EXCEPT IN IOWA, THE ALLEGED PLACE OF MAILING,—AND THEREFORE THERE IS NO RIGHT TO REMOVE APPELLANT TO SOUTH DAKOTA.

A representative allegation is the one in Count 1. It is there charged that for the purpose of executing their scheme, defendants

“Unlawfully, feloniously and knowingly did cause to be delivered by mail (at a town in South Dakota within the Southern Division) a described letter, which they placed and caused to be placed in the mails at Sioux City,

Iowa, for mailing and delivery, with intent that the letter should be carried by the mails and delivered to addressee in said town; and that it was thereupon delivered by the postoffice establishment according to the directions on the envelope. (22-342)

At the end of the indictment and speaking to all the counts of it, there is the further allegation,

"That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided." (41-342)

That is to say: There is, first, the conclusion that defendants caused delivery; second, that they mailed the matter which said conclusion declares they caused the delivery of; third, that the statute was violated by knowingly doing said "placing or causing the placing" of such matter in the mail, at Sioux City, Iowa.

In the case of *Stever*, 222 U. S. 167, the defendant was indicted in Kentucky where a letter mailed in Iowa was delivered. The letter was addressed to one in Kentucky, and there delivered to addressee. The indictment, as here, charges knowingly, etc., "depositing and causing to be deposited" in the mail in Iowa; and there is, as here, the conclusion that defendant had "caused" the said mailed matter "to be delivered by mail to the person addressed." So far, the two indictments are almost literally alike. The only difference is that the *Stever* indictment is less vulnerable than the one at bar because it does not have the allegation that the violation complained of is the knowingly placing in the mail. In its decision of the *Stever* case by this court, it italicizes the words of the lottery statute—"or at which it is caused

to be delivered by mail to the person to whom it is addressed"—and then says:

"The claim is that an indictment lies in the Western District of Kentucky, because that is the district in which the defendants caused the letter mentioned 'to be delivered by mail' to the person addressed."

It held that Kentucky did not have jurisdiction.

Unless there is some valid objection to or tenable differentiation of the *Stever* decision, it rules here that South Dakota has no jurisdiction.

Part 1-b.

THERE IS NO VALID OBJECTION TO OR DIFFERENTIATION OF THE *STEVER* DECISION.

An amendment to Section 5480 R. S. was effective, generally, at the time the *Stever* case was decided, but was never effective as to *Stever*. That is to say, the statute under which he was indicted did not have the words "or shall knowingly cause to be delivered, etc.," which quoted words are found in said amendment and in the *Stever* indictment. We freely concede that if the *Stever* decision is a construction of said amendment, that would, under some conditions, make it an *obiter dictum*. But we submit that this court did not construe said amendment; that in construing the quoted words it did not act gratuitously, but in response to having urged upon it that it should construe them. It was pressed upon it that this was all there was for it to do—that it should decide whether the statute which did rule the *Stever* case did not in effect have the equivalent of "knowingly cause to be delivered." Upon the assertion that it did have, was based the sole argument finally presented, to wit, that because the equivalent of those words was in the original statute, which the court undeniably had for construction,

Kentucky had jurisdiction,—and settling that issue could not be *dictum*. That this is the situation, a reference to the *Stever* record and to existing conditions when the *Stever* appeal was submitted, makes manifest. The Government was evidently of opinion that Section 5480 as it stood before said amendment did, in effect, though not in terms, prohibit those who like *Stever* were charged with being devisors of a scheme and knowingly causing matter to be mailed in aid of that scheme. It is inconceivable that the Government should put knowingly causing delivery into an indictment and make those words the basis for claiming jurisdiction if those words could be found only in an amendment that was *ex post facto* as to the *Stever* case. It is inconceivable that this court would base its decision on such an amendment. *Ex post facto* construction is as bad as *ex post facto* legislation. *Erbaugh*, 173 Fed. at 435.

It is plain the pleader must have proceeded on the theory that the equivalent of said words was in the statute that did rule the *Stever* case. When the case was submitted, the Government in its brief set out the statute, plus said amendment, and in that brief advised the court that, "the result (of amending) is no substantial change in the law, but a reassembling of the provisions relating to a scheme to defraud, in a more suitable manner." Such concessions have always been deemed effective. (*Burr's case*, 8 U. S. 505.)

Here, then, was, first, the framing of the indictment (which unless we are to assume that the Government desired a decision to be based upon an *ex post facto* amendment) declares that the effect of these words is in the original statute and, second, a square concession and contention that the amendment had not changed the original as to the point that was before the court. In other words, that after the amendment, as well as before,

the original prohibited those who had devised a scheme from knowingly causing mail to be delivered in an attempt to execute such scheme. The effect of it all was that the parties joined issue, and there was finally submitted as the sole issue, whether the said words found in said amendment and in the Stever indictment, had their fair equivalent in the original statute, and whether, that being so, the presence of those words there gave jurisdiction to a district in which the mail was delivered, but in which it was not mailed.

Manifestly, the decision cannot be attacked for being an *obiter dictum*. For, an *obiter dictum* "is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it." Hart (Fla.) 6 So. 455, 456.

The real objection to such *dictum* is that it is a pronouncement on a point which the parties failed to notice and on which no argument or authorities are presented. *Lyman*, 161 N. Y. 119. In *Rohrbach*, 62 N. Y. 47, 56, it is said that "*dicta* are opinions of a judge * * * made without argument or full consideration of the point." And *First Bouvier*, p. 568, says of this definition that "probably no better definition can be found." So does *Newman's case*, 49 S. E. 926, 931, and see *Brown*, 102 Wis. 137.

Surely, that objection will not lie here. The point was pressed for decision. It was not only fully argued, but all essential argument was addressed to it. The court not only gave the point consideration, but treated this single point as being the controlling one.

That criticism cannot be made where a matter is submitted for decision, is fully argued, is all that is submitted and is fully considered. If what is said in such circumstances be a *dictum* at all, it is a *judicial dictum* as distinguished from an *obiter*. See *Bouvier* and also

15 C. J., page 953, supported by many citations from Illinois, Ky., Miss., N. J., New York, Pa. and Wis.

Judicial dictum is the expression of the views of at least a majority of the court upon a matter which, while possibly not essential to a decision, was presented, argued and considered * * * they should accordingly not be disregarded without extraordinary reasons appearing therefor. Such declarations as to the law are, to say the least, very persuasive, and *nisi prius* courts and counsel, in absence of something to the contrary, usually act upon them.—*Zeuske v. Zeuske* (Oregon) 103 Pac. 648, 651.

An expression of opinion upon a point involved in a case argued by counsel and deliberately passed upon by the court, although not essential to the disposition of the case, if a *dictum*, should be considered a *judicial dictum*, as distinguished from a mere *obiter dictum*," i. e., an expression originating alone with the judge who writes the opinion, as an argument or illustration.—*De Rosa* (Vt.) 76, At. at 153, 155.

All the propositions assumed by the court to be within the case, and all questions presented and considered and deliberately decided by it, leading up to the final conclusion, are as effectually passed upon as the ultimate question solved, and the judgment is authority upon all the points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching the final conclusion.—*Brown v. Railway* (Wis.) 78 N. W. 771.

But as said, we contend there was no *dictum* at all, but a square decision—a binding definition that "knowingly cause to be delivered," does not give jurisdiction to a district in which no mailing was done.

Division II.

HAD THERE BEEN NO STEVER DECISION, IT WOULD STILL BE JUDICIAL, LEGISLATIVE AND CONTEMPORANEOUS CONSTRUCTION THAT SAID AMENDMENT HAS NOT GIVEN JURISDICTION TO A DISTRICT IN WHICH NO MAILING WAS DONE.

Part 2-a.

THE JUDICIAL INTERPRETATION OF THIS AMENDMENT IS THAT IT IS A CHANGE IN SUBSTANCE AND HENCE, THAT IT IS NOT A VENUE PROVISION. FOR A PROVISION DEALING WITH VENUE DEALS WITH PROCEDURE AND NOT WITH MATTERS OF SUBSTANCE.

The C. C. A. case of *Bettman*, 224 Fed. at 825, and of *Charles*, 213 Fed. 710, declares that the amendment is "an enlargement" of the statute and treats it as dealing with the meaning and use of the words scheme and artifice." And the *Bettman* case asserts that, by implication, *Young's case*, 236 U. S. 161, holds the amendment works an enlargement of what constitutes the scheme or artifice. Atwell Criminal Procedure, Section 55, declares the amendment broadens and betters the statute. And in its brief in the Stever case, the Government, as seen, concedes that the amendment affects *substance* in that the result is said to be no substantial change in the law but a reassembling of the provision relating to the scheme to defraud, in a more suitable manner.

As venue provisions deal with nothing but procedure and therefore do not deal with substance, an amendment that constitutes a mere broadening or enlarging of the substance of a statute is therefore not a venue provision, and works no change in place of trial.

We add to the concession made by the Government the assertion that the concession but states the fact. We

hope to show that though the original statute does not have the words of the amendment, it has their fair equivalent so far as devisors of schemes are concerned. And of course the fair equivalent of words has the same effect as if those words were found in the statute in terms. The Stever decision so deals with obtaining by false pretenses, because while the statute does not have those words, it does prohibit "any scheme or artifice to defraud." To like effect is the *Bettman case* (C. C. A.), 224 Fed. 825; the *Samuels case* (C. C. A.), 232 Fed. at 536, 540. And see *Stockman's case*, 205 Fed. at 467, 468.

In a word, we shall attempt to show that so far as those who, like the appellant, are charged with having devised a scheme, are concerned, the original statute prohibited their knowingly mailing in aid of that scheme—wherefore, the Stever decision construed not the amendment, which did not apply to Stever, but the original statute which did.

Part 2-b.

IN ADDITION TO JUDICIAL CONSTRUCTION THAT CAUSING CONSISTS OF MAILING THAT, THEREFORE, THE VENUE LIES WHERE THE CAUSING IS DONE, AND THAT A PROHIBITION OF "CAUSING TO BE DELIVERED" DOES NOT CREATE ELECTIVE VENUE, THAT IS ALSO THE LEGISLATIVE AND CONTEMPORANEOUS INTERPRETATION OF SAID QUOTED WORDS.

These interpretations are merely declarative of the settled law that elective venue does not exist unless expressly created. This was held in three libel cases wherein removal was unsuccessfully sought from the district of mailing to the one in which the libel circulated. (*Cummerford*, 25 Fed. 902; *Dana*, 68 Fed. at 888, 889; *Smith*, 173 Fed. 227.) If this be sound law the same conclusion must be reached here because Section 215 does

not have an express elective venue provision—or for that matter any venue provision.

Coming now to legislative construction of the words of the amendment:

The lottery statute has the words “knowingly causing to be delivered” but it also has a specific provision for elective venue. If the quoted words were deemed sufficient to provide such venue, why was such express venue provision added? The Mann Act, 36 Stat. 825, 826, punishes those who knowingly transport “or cause to be transported” any female or procure or obtain “or cause to be procured or obtained” tickets, etc.; or knowingly persuade her or cause her to be persuaded or “knowingly” cause * * * such woman or girl to be carried or transported. But Congress did not deem the word “causing” to authorize elective venue, because it added to the word or words “causing” a specific provision giving an election as between several places where in prosecution might be had.

This invokes the rule that where there is legislative construction in one act as to the meaning of certain words this is entitled to consideration in construing the same words in another act. *Railway v. Railway*, 53 Pa. State, 20. Indeed, a presumption is raised that the meaning attached to words found in one enactment are intended to have the same meaning when used in another enactment.

When the subject matter to which words in statutes enacted at different times have reference is the same, it should be presumed the words were used in the like sense in each of the different enactments. 25 R. C. L. (Statutes), Sec. 238.

Whenever a legislature has used a word in a statute in one sense, and with one meaning, and subsequently uses the same word in legislating on the same subject

matter, it will be understood as using it in the same sense. *Eckerson v. Des Moines*, 137 Iowa, 452; *In re Linn County*, 15 Kan. 500; *State v. Garthwaite*, 23 N. J. L. 143; *Oneida County v. Keppler*, 125 Wis. 18; *Oneida County v. Tibbits*, 125 Wis. 9; *U. S. v. Twenty-Four Coils of Cordage*, 28 Fed. Cas. No. 16,566; *Baldw.* 502 (affirming 28 Fed. Cas. No. 16,573, *Gilp.* 299).

It is not permissible construction to make one statute cover what is effected by another. *U. S. v. Sauer*, 88 Fed. at 250; *Stever v. U. S.* 222 U. S. 167.

Nor did Congress stop with so interpreting the word "causing." It has steadfastly declined to put those words into what is now Section 215 Penal Code, or into any statute except the lottery statute.

Assuming for the sake of argument that Congress could authorize prosecution for the mailing of a letter in a district where the mailing was not done but where delivery occurred, yet it was not bound to authorize this. And legislative history shows that it declined to do it.

Section 284 of Chapter 355, Act June, 1872, was the beginning of forming what afterwards became the lottery statute. (Section 3894, R. S.) This section contained none of the phrases now under discussion. But when what later became Section 3894 was amended in 1890, then, for the first time, was inserted the words "knowingly cause to be delivered"; also the alternative venue provision which has ever since been retained in the lottery statute. It was in 1901 the first attempt was made to put into what is now Section 215 what the amendment of 1890 had put into 3894. The attempt was made in the report of a commission created by Congress to file a preliminary draft of a penal code. This report also proposed putting said amendment into the statute dealing with the mailing of obscene matter and the one dealing with unmailable matter, generally. There seems

to have been no action on this report for some time. But on April 10, 1906, at the first session of the 59th Congress, H. R. 17984, being a proposed code of penal laws, was introduced. Section 223 of this proposal was practically identical with the proposal found in said report of the commission made in 1901. And by means of that section, and of Sections 218 and 225, it was proposed to keep "causing to be delivered," and elective venue in the lottery statute, and also to put these into the obscene letter, statute, and the one dealing with nonmailable matter, generally. No action seems to have been had on this bill. But on January 10, 1907, H. R. 23946, was introduced as a substitute for H. R. 17984, and this substitute was a proposed revision and codification of the penal laws. Section 208 of H. R. 23946, eliminated the said report of the commission in 1901, and of H. R. 17984, which report and bill proposed the double venue, from the statute on obscene and libelous matter, and also from the one dealing with nonmailable matter, generally. But it retained it in the lottery statute. Nothing seems to have been done with the substitute. But on January 7, 1908, Senate Bill 2988 was introduced. Section 16 of this Senate Bill followed H. R. 23946 in eliminating the said proposal of the commission made in 1901, and of H. R. 17894. The Senate Bill retained alternative venue for the lottery statute, only. Very shortly thereafter Section 215 of the Penal Code was enacted, and without the proposed and recommended provision for election between districts. This can but mean that Congress deliberately rejected all proposals for double venue except as to the lottery statute.

An undeviating course of legislation in a certain direction, continued for a long time, and being an effect to perfect the law relating to a certain subject, strongly emphasizes the expression found in

the final declaration of the legislative will. *Wellsbury v. Traction Co.* (W. Va.), 48 S. E. 748.

And the refusal of the legislative body to insert a provision contained in an act as originally reported to it is most persuasive against construing the act passed to include that provision. 25 R. C. L. (Stat.), 271. *Weaver v. Davidson* (Tenn.), 59 S. W. 1105; *Calhoun v. Little* (Ga.), 32 S. E. 86.

Where a committee of high standing reports that existing law permits no removal to the District of Columbia, and "upon this report, no further action was taken nor any further legislation proposed * * * nothing short of express legislation (giving such jurisdiction) could be weightier as contemporaneous construction." *Dana*, 68 Fed. at 902, 903.

There is no reason for saying that in said amendment of Section 215 Congress for the first time intended by a prohibition of "causing" to give jurisdiction to the district of delivery though it was not the one of mailing. No reason appears why, if it was intended to permit prosecution in that district, Congress would not have continued its practice of saying so in plain words. The courts will not conclude that Congress "which might easily have conferred jurisdiction in plain and explicit language resorted to contrivance to perfect it."

Chapman v. U. S. 164 U. S. 436, 17 Sup. Ct. at 79.

An attempt having been made to have the word "writing" include "letter" it was held that as it appeared in all the statutes *in pari materia* that Congress used the word "letter" when that was intended it should not be held that Congress "adopted some unfamiliar and inferior and in every sense ambiguous term to express the idea." (Letters.)

Chase v. U. S. 135 U. S. 255, 10 Sup. Ct. 756.

Why should this court hold that Congress intended to create an elective venue by using "causing to be de-

livered" which is truly an "unfamiliar, inferior and in every sense ambiguous term to express the idea" of permitting prosecution either in the district of mailing or in that of delivery.

As to contemporaneous construction:

Prior to the decision of the Stever case, it seems to be the only one in which an attempt was made to prosecute in a district other than the one of mailing, to wit, the one in which delivery occurred.

Since the time when the amendment became effective, and to the time when the indictment at bar was returned, the only case in which there was an indictment in the district other than the one of mailing was that of *Moffatt*. (C. C. A. 232 Fed. 522.) And in it jurisdiction was not mooted.

An investigation beginning with the time when the amendment became effective, and ending with the advance sheet pamphlet of November 1, 1923, discloses that with the exception of the *Moffatt* case, in 42 reported cases it appears affirmatively that the prosecution was in the district of mailing and in the remaining 33 the same thing appears by unescapable implication—and in none of them the provision of the amendment "knowingly caused to be delivered" is so much as mentioned.

The summation is that the words of the amendment were not generally believed to authorize prosecution in a district in which no mailing was done.

Part 2-c.

THE AMENDMENT WAS NOT INTENDED TO WORK A CHANGE IN PLACE OF PROSECUTION, BUT TO REACH A NEW CLASS OF OFFENDERS.

We have pointed out in another place that the courts have construed the amendment to be a change of substance and therefore, not an alteration of mere procedure, to wit, regulation of place of trial. We now submit it appears affirmatively that it had for its object something other than making a change in the place of prosecution. Our position is that what the amendment does do is to add a class who before the amendment became effective were immune from punishment, no matter how much they caused or aided delivery, so long as they were not parties to the devising of the scheme.

It is a truism that if the amendment is not directed to the offense here charged it affects that charge no more than if no amendment had been enacted—that if it does not affect this indictment at all, it does not affect the place where prosecution thereunder shall be had.

Public history discloses that employees of the postal establishment aided in delivery of objectionable matter. The amendment begins with “or” and is therefore in the disjunctive; which means it is not a substitute but a covering of something not found in the original, or at least a covering of something whose presence in the original was open to doubt. (*Culp*, 82 Fed. at 991.)

Congress knowing this public history and knowing that the original statute did not affect those who merely aided a scheme devised by others than themselves. (*Foster*, 171 Fed. 171; *Stewart*, C. C. A. 119 Fed. at 93, 94) made this amendment—manifestly, to cure this *casus omissus*; and it is not to be inferred that by so doing it intended to change the meaning of words it

had already employed in the original; *i. e.*, to give them a meaning creating an elective venue which meaning did not belong to the words of the original. (*Milby*, 121 Fed. at 1; *Kellogg*, 126 Fed. at 326.)

It is presumed an amendment is not a substitute for but a branch of the original enactment, and, as said, in *U. S. v. Sauer*, 88 Fed. 249, the amendment "becomes merged in the other but each one moves off separately."

It is said in *Charles v. U. S.* (C. C. A.) 213 Fed. at 710, that in making this amendment it was "the intention of Congress to reach *any and all classes* of individuals who may form the intention of using the mails for fraudulent purposes," including persons who might carry out a plan to defraud by means of invoking the aid of those who were not parties to the original scheme. And the Bettman's case (C. C. A.) 224 Fed. at 825, approves what is above quoted.

If we assume that mailing by devisers is a knowingly causing delivery of what they mail, then, if it is held that the amendment is aimed at devisers, it must first be held that Congress intended the amendment in the disjunctive, to be a repetition of the original. And it must be held, also, it was intended to inflict the single penalty of the statute, twice. Once, for mailing. Again, for causing delivery, another name for mailing. As well claim that if there were a conviction on an indictment that sets forth the doing of acts that constitute larceny, and which indictment also states as a conclusion that larceny was committed, the penalty of the statute must be twice inflicted.

In both the *Stever case* (222 U. S. 167) and in *U. S. v. Sauer*, 88 Fed. at 250, it is ruled that Congress should never be held to have intended to make two distinct provisions referring to the same subject matter; and the *Stever case* holds that, therefore, Congress could not

have intended to make the offense denounced in Section 215 indictable under either of two distinct statutes. Surely, it would be a greater anomaly to attribute an intent to have that section punish the same act twice with the sole punishment provided in the statute. Concretely applied, doing this would work that the penalty of Section 215 would be inflicted for the acts constituting a causing to be delivered, and inflicted again for the offense of causing to be delivered, charged by way of conclusion.

As it is universally held that the depositing and causing to be deposited, etc., is a complete offense, of course that offense may be punished only where the depositing, etc., was done. If the government may prevail, it must first be held that the prohibition of causing delivery creates an additional offense which may be proceeded against in either district, though the depositing, etc., can be prosecuted only in the district where the mailing is done; and it must next be presumed for the government that it was intended to draw a wholly duplicitous indictment. For each and every count charges both the complete offense of the mailing done in Sioux City, and, on the theory of the government, the additional offense of causing delivery of what was mailed in Sioux City. At this point we are not presenting an argument on the effect a duplicitous indictment has on the right to remove. We are but arguing that if by reason of being a complete and new offense a causing of delivery gives jurisdiction to South Dakota, that jurisdiction must be granted at the expense of presuming that a wholly duplicitous indictment was intended to be drawn.

It will be conceded that South Dakota is without jurisdiction so far as the original statute is concerned.

If it has jurisdiction it must come from the fact that the amendment has added a new offense which is of such nature as that prosecution may be had in the district of delivery, though that is not the district of mailing. If the amendment does not create a new offense, then of course it does not create one of such nature as to give venue to South Dakota. If a new offense is needed for that purpose, the purpose is not accomplished if there be no new offense. The indictment was not intended to charge any newly created offense. As seen, it cannot be construed to assert such offense unless it is first presumed the pleader intended to frame a duplicitous indictment. The complete offense of placing the described letter in the mail is charged. If the causing is an additional offense, then each count of the indictment charges two offenses. If it should not be presumed for the pleader that he intended a duplicitous indictment the pleading must be assumed to have been drawn on the theory that the amendment creates no new offense. There being no such offense created, there falls to the ground any theory of elective venue based on the assumption that the amendment does create a new offense.

We submit that the amendment does not create a new offense, and that that fact makes immaterial to consider what would follow if the amendment created a new offense. We repeat, the purpose was to bring a new class of offenders within the statute.

Part 2-d.

THE GIVING THE SAME ACT TWO NAMES IS NOT TO BE PRESUMED; AND IF DONE, EFFECTS NOTHING.

It must be so that only the *casus omissus* only was aimed at. A post-office employee might cause delivery, innocently. Therefore, the putting the word

“knowingly” into the amendment demonstrates that it was other than devisors who were being dealt with. As to the devisors, the word “knowingly” was unnecessary. For one who mails to aid his own scheme, of necessity, acts “knowingly.” As to post-office employees it was a necessary limitation because, manifestly, they might cause delivery either knowingly or innocently. The sole object of the amendment was to punish others than the devisors if they knowingly aided delivery—and thus to punish those who without the amendment would be immune.

In *Nielsen's case*, 131 U. S. 176, 9 Sup. Ct. at 676, 677, and *Ex Parte Lange*, 85 U. S. at 171, there is approved a New Jersey decision (*Cooper*, 1, *Green*, 361) that one who had been convicted for arson cannot be punished under a later indictment for the murder of one who came to his death from burning in the fire caused by that arson. The *Nielsen* case rules also that one who is charged with murder committed in the perpetration of a burglary if acquitted on that, cannot afterwards be convicted of a burglary with violence in aid of which said murder was done; and so of murder and manslaughter; and of seduction and fornication with the same prosecutrix. (677) It holds, too, that while the crime of loose and lascivious association and cohabitation does not necessarily imply sexual intercourse like that of living together as man and wife, yet it is strongly presumptive of it; and that, be that as it may, it seems clear that where one has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents, without being twice put in jeopardy for the same offense.

In *Telegraph Co. v. Bierhaus* (Ind. App.) 36 N. E. 161, it is held that where one statute declares a given act to constitute a criminal offense and prescribes pun-

ishment therefore, an amendment in the nature of a penal or *qui tam* enactment should not be so construed as to bring the act constituting the crime or offense within the purview thereof, unless the amendment so provides in express terms.

The test is simple: if these defendants were indicted and tried for the mailing in Sioux City, and were either acquitted or convicted, would it be claimed they might thereafter be indicted and tried, anywhere, for causing the delivery of the letters mailed in Sioux City. The sum is the concession by the Government made in the *Stever* brief, *i. e.*, the amendment has made no change in place of prosecution of devisers of schemes. It touches devisers in no respect.

Part 2-e.

THERE IS NOTHING IN THE WORDS "OR SHALL KNOWINGLY CAUSE TO BE DELIVERED" THAT, EVEN SUGGESTS THAT IT IS INTENDED TO SUBSTITUTE THESE WORDS FOR "MAY BE PROSECUTED EITHER IN THE DISTRICT WHERE THE MAILING WAS DONE OR IN THE DISTRICT WHEREIN THE MATTER MAILED WAS DELIVERED."

It may be conceded that if delivery were denounced venue would lie in the district of delivery because self evidently Congress knows that delivery will be made in the district where it occurs. But so much cannot be said of a prohibition against causing delivery. As said, nothing in those words so much as suggests that place of prosecution is being dealt with. And, as seen elsewhere, Congress as well as the bench and bar have construed the causing of delivery not to be the creator of elective venue.

There is nothing in the words "causing to be delivered" which can work any change in place of trial. To say so is simply to say that using the word "white"

does not warrant a construction that the word used means "black."

It is not enough that there was *an amendment*. If the change were, say, one in the statute of limitations, or in penalty—to contend that this changed the place of trial would not be no more violative of reason than is a claim that prohibiting the causing of delivery is a declaration that one may be tried in a district where no mailing was done.

This discussion cannot be more aptly closed than by certain quotations approvingly made in the Chase case, 135 U. S. 255; 10 Sup. Ct. at 758. The first is one from *Queensbery's case*, 1st Bligh. 497:

"The proper mode of disposing of difficulties arising from a literal construction is by an act of the legislature, and not by the decision of courts."

The second is from *Jones v. Smart*, 1st Term R. 51:

"It is safer to adopt what the legislatures have actually said than to suppose what they meant to say."

Division III.

Without Reference to the Stever Decision, It Is Settled Law That Devisors of Schemes May Be Prosecuted Only in the District Where They Did the Mailing, and This Is So, Though the Statute Denounces Their Causing a Mailing in Aid of Their Scheme.

It cannot be said too often that the statute does not denounce the act of delivery; that it limits is prohibition to a causation of delivery. It is a trite argument often used in opposition that a violation of Section 215 as amended is analogous to where a shot is fired on one side of a boundary line and its impact causes a homicide on the other side of the boundary. The analogy is utterly imperfect. Firing such a shot with such result is clearly

within Section 731, R. S. The thing denounced being the killing, the firing of the shot is not the complete offense. It is completed on one side of the boundary by an act initiated on the other side which was fairly calculated to accomplish murder where it did so. We shall speak to this point more fully in dealing with Section 731 and when we seek to distinguish as to venue to prosecute for an act completed in one district which has injurious consequences in another, and an act which becomes complete by action in two districts. For present purposes, we but inject this consideration of the boundary line argument to make clear that said particular argument is untenable when applied to a case like the instant one.

It would be a perfect analogy if the statute, instead of denouncing a murder, prohibited merely the firing of a shot with intent to kill. In that case, no one would contend that the shot effective in a second district would permit prosecution except in the first district where the prohibited firing of the shot was done. It is the word "causing" used as a verb which the amended statute involved here denounces. The supposed case of prohibiting the firing of the shot is a perfect analogy. So would be a statute prohibiting the winding up of a clock. If that were completed in Iowa there could not be prosecution in Illinois, because as a result of that winding, the clock was found running in Illinois. If two, while in Iowa, bargained that one should cut wood standing in Illinois, whatever consequences attached to causing the wood cutting would have to be dealt with where the bargain was made. It would not transfer venue to Illinois, because the cutting thus bargained for in Iowa was done in Illinois.

(See page 33.)

Part 3-a.

SO FAR AS DEVISERS OF SCHEMES ARE CONCERNED, PROSECUTION FOR CAUSING DELIVERY MUST BE HAD IN THE DISTRICT WHERE THE MAILING IS DONE BECAUSE MAILING BY THEM IS THE CAUSING OF DELIVERY.

If it be the law that mailing by a deviser is a causing of delivery, the constitution commands that the prosecution must be had where the mailing was done—and the indictment says the mailing at bar was done in Iowa. That mailing is causing, is *stare decisis*.

We have, throughout, assumed for the purposes of argument, merely, that as to defendants in the class in which the defendants at bar are, causing to be delivered must be punished where the mailing is done—have so assumed that causing delivery on part of those in that class consists of depositing in the mail with due address and stamping, and with intent that the establishment shall make delivery according to the directions on the envelop. We now submit that what we have heretofore assumed is in fact true.

There are but three acts for which it *can* be claimed that they cause delivery. (a) the act of delivery; (b) doing something to aid hastening or insuring delivery after the mailing has been done; (c) putting into the mail with due address and stamp. The first two are eliminated. The indictment does not accuse defendant of having done either. No act subsequent to the mailing is charged—and self-evidently the act of the post office establishment in making a delivery cannot be “causing” done by the *mailer* and deviser.

The original statute in terms denounces the depositing of a letter to be sent or delivered by the post office establishment. *Young*, 232 U. S. 155; 34 Sup. Ct. 303,—and it is universally held that such phrase

describes the having the letter carried and delivered through the mail. *Sauer*, 88 Fed. 252; *Hume*, 118 Fed. 695,—In *Rinker's* case (C. C. A.) 151 Fed. 757, it is held that mailing a letter duly addressed and stamped is a deposit in the post office for mailing and delivery. To like effect is the *Olsen* case (C. C. A.) 287 Fed. 89, citing *Young*, 232 U. S. 155; 34 Sup. Ct. 303, and the C. C. A. decisions of *Rimmerman*, 186 Fed. 304, and *Hume*, 118 Fed. 689.

Deposit with due stamping and intent to have the letter delivered, sets in motion the machinery of the post office department. (*Morse*, 287 Fed. 912.)

Add to this the presumption that the machinery set in motion is that which will accomplish delivery and it is once more made plain that the proper mailing of a letter works a causing of delivery.

Manifestly there can be no causing of delivery without some act on the part of the mailer. He must do something to invite action on the part of the establishment. It has been held that the deposit of a letter duly addressed and stamped, discloses his intent that the establishment should deliver the letter to the addressee. *Stokes*, 157 U. S. 187; 15 Sup. Ct. 619, last column near bottom.

It will be conceded that if one placed a letter in the post office and the letter was without address or stamp affixed, or lacked both, that nothing had been done to cause delivery. Such deposit would give no authority to make delivery and therefore the agents of the establishment would do nothing to bring about delivery. Even as it must be conceded that such deposit would not be a causing of delivery, must it be conceded that when the deposit has due address and stamp, the establishment has a duty to deliver and a presumption is raised that the establishment will do what it should to bring about delivery, and that delivery in due course has been ac-

complished. The stamping is what "legally sets in motion the machinery of the post office department." Morse 287 Fed. 912. And see the Demolli case (C. C. A.), 144 Fed. 363.

Since the law does not permit a step toward delivery to be taken until the mailer has deposited, duly addressed and stamped, since it is the law that when he has done that, there is a duty to take the steps that will bring about the delivery and that that duty has been performed in due time and course, it must be true that the doing of said acts is the causation of delivery. It must be true that where an act is done for the purpose of inducing the establishment to deliver, that without such act no such step would be taken, where such step creates a duty to deliver, and general experience shows that duty was performed, such act must be the causing of delivery.

Would not one who had addressed a letter, stamped the envelop and deposited both in the mail, feel in common with all men that he had caused delivery to be made—had effectively arranged for delivery?

Following the *Lemmon* case (C. C. A.) 164 Fed. 957; the *Olsen* case (C. C. A.), 287 Fed. at 89, construes Section 215 as now amended, and holds that the "mailing" is execution or attempted execution of the scheme "is the gist of the offense" denounced by the statute; and that it is that act and it alone that confers jurisdiction upon the courts of the United States to punish authors of fraudulent schemes." Since then after the enactment of the amendment, mailing remains the gist of the offense and is still the only act that gives the federal courts power to punish, it must follow that the venue is still confined to the district of mailing.

Another reason why mailing constitutes causing is found in the line of decisions of which *Olsen's* case

(C. C. A.) 287 Fed. 89 seems to be the last and which holds that mailing still remains the gist of the offense. Both original and amendment should be given effect and both should be held to effect something. Now the amendment merely prohibits causing delivery and says nothing as to what shall constitute such causing. But the original does prohibit mailing. If it be not the meaning of the amendment that those who helped delivery in aid of a scheme devised by others shall also be punishable, the amendment has no ascertainable meaning. If it does not mean such mailing, there is, as said, no statement as to what act shall constitute the causing, and the amendment will be wholly without meaning.

Mailing is causing because the statute is directed to schemes "to be effected by * * * opening * * * correspondence or communication * * * or by inciting another to open communication with the person so devising or intending." It is impossible to see how such inciting can be accomplished and communication obtained except by the act of mailing for the purpose of having the thing mailed reach the addressee—by doing what through the action of the department obtained by the mailing will procure such correspondence or communication.

Part 3-b.

WHERE, AS HERE, "CAUSING" IS USED AS A VERB, VENUE LIES ONLY WHERE THE MACHINERY THAT OBTAINS DELIVERY IS SET IN MOTION.

It cannot be said too often that the words, "causing to be delivered," do not prohibit delivery; that the prohibition is not directed to a result but to steps taken to bring about a result; that the prohibition is directed to acts of causation and not to effects. In other words,

what is denounced is described by the verb "causing"—and it is a truism to say that venue lies only where whatsoever constitutes a causing was done. For illustration, if it could be made a crime to wind up a clock and it were wound up in Illinois the prosecution would lie in Illinois, only, even if after the clock was wound it was carried across in another state and permitted to keep on running as long as it would on the winding done in Illinois. If the causing timber to be cut in Illinois could be made an offense if, of two, while in Iowa, one hired the other to cut timber standing in Illinois, the prosecution for causing the cutting would lie in Iowa, only, though the cutting were done in Illinois.

In fewer words, "causing" is merely an impetus that sets in motion what later may produce or produces the natural effect of the causing. But the venue lies only where the setting in motion is done.

Where one so deposits a letter as that the deposit becomes a means of effecting delivery in aid of his scheme, he has caused the delivery that later takes place.

The verb "cause" never has the meaning of nouns such as "result" or "effect." To cause, is the setting in motion the machinery that brings about a result or effect. It follows that if the delivery of a letter is caused in Iowa, prosecution must be had there, even if the causing done in Iowa brought about a delivery in South Dakota.

The meaning of "cause" when used as a verb is elementary dictionary learning. The Century Digest defines it to be (a) to "act as a cause or agency in producing"; (b) to "effect"; (c) to "bring about"; (d) "to be the occasion of." That means the causation of delivery is a setting in motion that which causes others than the depositors to deliver the deposit.

Manifestly mailing is (a) the "cause or agency" pro-

ducing delivery; (b) the act that would "effect" or "bring about" the delivery; (c) it is the "occasion of" the delivery; (d) it is calculated to effect the delivery and is an efficient selection of means; (e) if an offense at all it is "a single act" actually committed in Iowa and nowhere else; (f) though "the ultimate consequence" of the act happened in South Dakota, that is a state in which defendant "did not act" and (g) Iowa is "where the manifest act of defendant was done—where his active agency was employed." In effect the instant case does not differ from that of *Fowkes* (C. C. A.), 53 Fed. 13, in which a voucher was signed in one state, a rebate was thereby to be caused to be paid in another and wherein it was held the venue lay in the state where the voucher was signed.

(See page 54.)

The courts have had occasion to define this verb. It is done in the *Demolli* case, 144 Fed. 363. This case is quoted approvingly in the case of *Kenofsky*, 243 U. S. 440; 37 Sup. Ct. 439. In it, defendant devised a scheme to defraud an insurance company by collecting on a spurious death claim. He knew he handed the proofs to a superior officer, knowing that they would, as in fact they were, be mailed by the latter in the usual course of business to the home office for approval before payment. It is held that his act of delivering the letter to his superior was a causing because the word—

"Cause is a word of very broad import, and its meaning is generally known, and it is used in the section in its well known sense of bringing about, and in such sense applicable to the conduct of the defendant (for in that) he deliberately calculated the effect of giving the false proofs to his superior officer; and that effect followed, demonstrating the efficacy of his selection of means."

That is to say, a causing is accomplished when one does an act calculated to produce the effect desired. Applying this to the situation at bar, it is a ruling that the "causing" was done in Iowa.

It follows that when court decisions define what acts constitute a causing, then, even if the decision is not made in a case involving mailing, it still follows that when it is judicially declared what acts constitute a causing, the Constitution steps in and says the prosecution for doing those acts can be had only where those acts are done.

In the case of *Demolli* (C. C. A.) approved in *Kenofsky's case*, 243 U. S. 443 and that of *Rose*, 227 Fed. 362, the charge was—having knowingly deposited and caused to be deposited in a described post office "for mailing and delivery" a newspaper containing certain obscene articles.

The question is "was there any substantial evidence that the objectionable matter was by the defendant knowingly deposited or caused to be deposited in the post office for mailing or delivery."

It is said that under the evidence recited and which was found by the jury to be true, the defendant was responsible for the mailing of the objectionable matter since.

"he set in operation and made use of an agency which as he knew at the time would according to its established and regular course carry the objectionable matter through the mail to the persons to whose attention he designed it should be brought."—That one is responsible if there be an act "intentionally done by him with knowledge at the time that such (the deposit) will be its natural and probable effect." (365)

It was said in *Bone's case* 95 U. S. at 130, "the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."

That is, one "causes" when he sets in motion what he has reason to know will produce a result he desires. Applied here, it means he causes delivery when he does what makes it the duty of the Post Office establishment to deliver. His offense is complete when he so sets in motion. As said in the *Morse case*, 287 Fed. 912, mailing, duly stamped is the act which brings about "that the machinery of the United States Post Office department would be legally set in motion."

Get a definition of "causing" and it settles what district the prosecution may be had in. Once ascertain what acts constitute "causing" and the constitution does the rest. So while the *Demolli case* is not addressed to venue it gives such a definition of what constitutes a "causing" as that under the Constitution a prosecution for violating Section 215 can only be had wherever that is done which constitutes a "causing."

While the *Moffatt case*, 232 Fed. 532, is a *dictum* on where prosecution for causing delivery may be had, it decides that mailing the letter is the causing of its delivery. Moffat was convicted in St. Louis for causing delivery. The only causing shown was a mailing in Chicago. It is declared the evidence shows "that it was he that caused the preparations of the inclosures, the paying of the postage and the mailing of the letter at Chicago, with the intent and purpose that it should be delivered at St. Louis; and the fact that it was received at the post office in St. Louis instead of being delivered by the Department itself, at the special address, in no manner qualifies the intent and purpose with which the defendant deposited it."

Other decisions reach the same result because they define causing to be delivered to be a conscious participation in bringing about the use of the mail in aid of a

scheme to defraud. *Shea*, 25 Fed. 447; citing *Kenofsky*, 243 U. S. 440, 37 Sup. Ct. 438; *Goldman* (C. C. A.), 220 Fed. 57, 61, 63. See *Spears*, 250 Fed. at 251. It is self-evident that where one has devised such scheme and mails a letter intending to aid that scheme by so causing the letter to be delivered to the addressee, he is consciously participating in the causing of delivery—indeed—is using the mails in a way that brings about a delivery in aid of such scheme.

Then there is the line of cases of which *Olsen* (C. C. A.), 287 Fed. 89, seems to be the last, and which holds that the *mailing* is the gist of the offense and that it, and it alone, is the source of all jurisdiction to punish. The amendment was effective when the *Olsen* decision was made.

Division IV.

The conclusion of the pleader that defendants knowingly caused the letters mailed in Sioux City to be delivered in South Dakota will not suffice. It sets forth no offense. It merely gives the opinion of the pleader that an offense has been committed. (See 90-94.)

A naked conclusion that defendants did such causing brings the matter fairly within the statement of the *Hess case*, 124 U. S. 483, a mailing case, in which it is said that "the absence of all particulars of the alleged scheme renders the count as defective, as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken."

The accused is entitled to the facts and those cannot

be supplied by the conclusions of the pleader unsupported by a setting forth of any facts.

The *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 574, quotes from the *Cruickshank* case that one "object of the indictment is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

If the indictment "rests upon the mere conclusion of the pleader it is ineffective as proof of the existence of probable cause."

Morse, 287 Fed. at 915.

In *U. S. v. Sauer*, 88 Fed. 253, it was said to be gravely doubtful whether the following allegation was sufficient to charge a penal offense. That allegation was:

"So devising and intending in and for executing such scheme and artifice to defraud, and for the obtaining of money under false pretenses and attempting so to do, caused to be conveyed and delivered by mail."

"No conclusion of the pleader can overcome the facts set forth. *U. S. v. Conners*, 111 Fed. 734; and see *U. S. v. Greene*, 100 Fed. 941.

The court must be able to find the charge of crime 'in the facts alleged, and not in the pleader's conclusions as to logical connection of facts'—and it is not enough that there is a mere allegation that said acts were done pursuant to the conspiracy charged." *Tillinghast v. Richards, Marshall*, 225 Fed. at 229, 230, 232.

"The court must not rely on having faith in the pleader's allegation of a bare conclusion. It is for it to determine relevancy upon the facts alleged, and not by the pleader's opinion. If the indictment were permitted to be founded upon allegations which are a conclusion, its *prima facie* effect as evidence of probable cause would be entirely destroyed. *Idem*.

It was also incumbent upon the pleader to describe the scheme or artifice to defraud which had been devised with such certainty as would clearly inform the defendants of the nature of the evidence to prove the existence of the scheme to defraud, with which they would be confronted at the trial."

Tillinghast, 225 Fed. 232.

"It must disclose the particulars of the alleged offense in such manner as to state matters upon which issue could be formed for submission to a jury."

U. S. v. Hess, 8 Sup. Ct. Rep. 573, 124 U. S. 483.

"There must be set out clearly and distinctly what the artifice was, wherein the fraud consisted, and the facts and circumstances by which it was accomplished."

U. S. v. Post, 113 Fed. 854.

In *Miller's* case, 133 Fed. 341, it is ruled that there is no fair opportunity to defend unless the indictment clearly discloses the facts upon which a charge is based. That is also the fair effect of *Britton* case, 108 U. S. 199, 2nd Sup. Ct. 530, 531.

In *Morse v. U. S.* 287 Fed. 913, the charge of conspiracy to violate Section 215, was:

"To commit diverse, to-wit: 1,000 offenses against the U. S. of the kind, under the circumstances, in the manner and by the means and methods following, that is to say: This was followed by a general allegation as to the connection the "principal defendants" had with a certain Steamship Company. It was further charged that the "other defendants" aided, abetted and compelled "the principal defendants"; that these latter were to devise a scheme to defraud and all of them were to engage in the mailing of 1,000 letters and papers for the purpose of executing a fraudulent scheme; that the "principal defendants" were to make certain fraudulent reports in order to induce the public to buy the shares of said steamship company, and averring further alleged fraudulent acts of the "principal defendants." " "

It is held that this is not sufficiently direct, and that it violates the rule that an indictment should charge a

criminal offense in unmistakable terms free from doubt and not resting upon inference. Surely the indictment at bar departs much further from being a statement in unmistakable terms, free from doubt and one not resting upon inference. The *Morse* case cites with approval from *United States v. Dowling*, 278 Fed. 630, that for one thing, the indictment must "enable the court to say as to whether the facts set forth are sufficient in law to support a conviction."

The *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 573, analyses the *Cruikshank* case, 92 U. S. 542, to deal with a general charge in the indictment

that defendants, with intent to hinder and prevent citizens of African descent (named) in the free exercise and enjoyment of all the rights, privileges, immunities and protection given such citizens and so deprived, because these persons were of such descent, and that said indictment specified no particular right the enjoyment of which the conspirators intended to hinder or prevent.

It is declared, the *Cruikshank* case holds, that the aforesaid averments were too vague and general and lacked the certainty and precision required by the established rules of criminal pleading, and were therefore insufficient in law.

A representative allegation declares, so far as a fact charge is concerned, first, placing a letter with described postage in the post office at Sioux City; that the envelope was addressed to one Christianson at Viborg, in South Dakota, the place of his residence; that the placing was done with intent that the mailed matter should be carried by the mails and delivered to Christianson according to directions on the envelope, at the Town of Viborg; that it was there delivered according to direction (22-342). Second, there is an allegation that in aid of the alleged scheme, the defendants "did cause to be delivered by mail by the post office establishment of the

United States, according to the direction thereon, at the Town of Viborg and within the division and district aforesaid and within the jurisdiction of this court," the described letter mailed in Sioux City. It is, to say the least, a fair question whether this means to charge that the defendants caused delivery of the letter to be made while they were at Viborg, or whether in the opinion of the pleader, what they did in Sioux City by mailing with intent that the letter should be carried to Viborg, constitutes a causing of delivery done in Viborg. This ambiguity destroys the indictment. The ambiguity is found in the charging of the jurisdictionals, and jurisdictionals "must be obviously and plainly charged."—*Christopherson*, 261 Fed. at 226. As to jurisdictionals, the court is not to enlarge "by mere inference from the law or doubtful construction of its terms." *Post*, 161 U. S. 583. To like effect is *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, and *In re Terrell*, 51 Fed. 213. And in *Wolf's* case, 27 Fed. at 609, a removal proceeding, it is said that while the very substance of the law is not to be construed away, yet it is to be strictly construed. See *Morse*, 287 Fed. at 913; *Marx*, 122 Fed. at 965.

Passing ambiguity, the indictment is fatally defective because its jurisdictional allegations consist of nothing but naked conclusions of the pleader. The only fact charge other than that of the actual delivery, is a detailed statement as to the time when and the manner in which the letters in question were put into the mail in Sioux City, in the Northern District of Iowa.

For the causing of delivery, there is first the general prefatory conclusion:

"on the dates and at and during the times hereinbefore specified in the District of South Dakota and within the Southern Division thereof, and within the jurisdiction of this court, said defendants having heretofore devised

and intending to devise a scheme and artifice to defraud said corporation and said victims of its money and property by the various false and fraudulent practices, artifices and schemes as hereinafter more particularly set forth." (14-342)

There is nothing more than that defendant for the purpose of executing his scheme did "unlawfully, feloniously and knowingly cause to be delivered" at a named town in South Dakota. (22-342)

Be all that as it may—the charge which is the sole reliance of respondent, as it was in the Stever case, to wit, the knowingly causing delivery, is absolutely charged as a naked conclusion, in the very words of the statute, and without a single fact allegation in support, unless indeed, the fact support was intended to be the mailing in Sioux City. If that is the basis of charging the causing delivery, then the causing was done in Sioux City, and South Dakota has no jurisdiction. If, on the other hand, as was once suggested below, the mailing in Sioux City is merely descriptive of how the letter delivered in South Dakota got into the mails, we have to say, first, that that can scarcely be an adequate explanation, because the letters are copied in the indictment word for word—and it should not be assumed that a letter set out *in haec verbae* was intended to be further described by stating that at a certain time with certain stamping, it was put into the mails in a named town. But if the allegation as to mailing is to be treated as merely descriptive of the letter mailed, then we recur to the fact that the only charge of causing delivery is the naked statement, put in the words of the statute, that defendant did cause delivery.

In *Hess v. U. S.* 124 U. S. 483, it is declared that while "undoubtedly the language of the statute may be used in the general description of an offense, it must be accompanied with such statement of facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged."

The case quotes from *Cruikshank's* case, 92 U. S. 542, that

"It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species,—it must descend to particulars."

In the *Simmons* case, 96 U. S. 360, the second count pursued the words of the statute and says this:

That the defendant "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessels for the purpose of distilling, within the intent and meaning of the internal revenue law of the United States, in a certain building and on certain premises, where vinegar was manufactured or produced."

According to the *Hess* case, the *Simmons* case rules that this indictment was insufficient under the rule that "where the offense is purely statutory, having no relation to the common law, it is as a general rule sufficient to charge defendant with acts coming fully within the statutory description and in the substantial words of the statute, without any further expansion of the matter"—but that "to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused be apprised by the indictment with reasonable certainty of the nature of the accusation against him to the end that he may prepare his defense," and that "an indictment not so framed is defective although it may follow the language of the statute."

An indictment for conspiracy "to steal from a certain railroad freight car certain goods then and there moving as and constituting a part of an interstate shipment of freight," held fatally defective in not sufficiently identifying the offense which was the object of the conspiracy.

Anderson, 260 Fed. at 557.

It is held in the *Backus* case, 225 U. S. 472, that charges that an immigration inspector submitted evidence of some kind detrimental to petitioner, that this evidence was never presented to petitioner for inspection and was clandestinely forwarded to Washington and by reason

thereof petitioner was denied any opportunity to inspect such evidence or rebut it—are but conclusions without assertion of facts in their support, and that such allegations are insufficient to support a charge of bad faith.

Assume that the allegations as to the mailing done in Sioux City are merely descriptive of the letters mailed—and thus reduce the charge to the statement of the conclusion that defendants caused what was mailed in Sioux City to be delivered in South Dakota—and respondent is confronted with the well settled law just dealt with, to wit, that an indictment will not base removal if it merely charges in the words of the statute, and with the equally well settled law that an indictment which, as to its essentials, asserts nothing but the naked conclusion of the pleader, cannot base a removal.

Division V.

Against all this construction by bench and bar, against all that precedes, is a lone, bald dictum.

Up to the finding of the indictment at bar the *Moffatt* case (232 Fed. 522) is the only case reported in which it was attempted to prosecute in the district of delivery. In that case venue was not mooted.

While the *Moffatt* case reaches a conclusion opposite to what is ruled in the *Stever* case, that conclusion is but a naked conclusion and is as well the baldest of dictum. It advances no reason, cites no authority, and it ignores the *Stever* decision, the decision of other courts and the interpretation by Congress.

We submit next that if the *Moffatt* case were not a dictum it still could not prevail against a decision of the Supreme Court of the United States. More emphatically is that true where the question was squarely presented and in issue in the Supreme Court, and is dealt with by the way of dictum only, in the *Moffatt* case.

The case does not claim anything for the continuous offense statute; nor for the doctrine of innocent agency. It is a *dictum* that Section 215 should be construed to give jurisdiction to the district of delivery.

The opinion in the case states that the assignment under consideration urges there should have been a directed verdict because:

"There is no evidence tending to show that the letter upon which the conviction is based 'was delivered by mail according to the direction thereon.' " (Such delivery being alleged.)

It is ruled that the evidence clearly establishes such delivery. Manifestly, the point presented for decision was whether the evidence sufficiently supported said fact allegation of the indictment.

No question as to venue or jurisdiction was made. But in deciding the said fact question, the court seized a question of venue or jurisdiction out of the sky and proceeded to remark:

"The plain purpose in making it an offense to knowingly cause to be delivered by mail, according to the direction thereon, a letter, etc. was to confer jurisdiction upon the court at the place where the letter is delivered to punish the offender, and the statute must not be so strictly construed as to defeat this plain intention of Congress (532). * * * The delivery was in the City of St. Louis, in substantial compliance with such intent and purpose, and conferred the jurisdiction in this case intended by Congress, when it defined the offense."

What occasion was there to make this statement? Who had tendered any question as to what Congress intended the definition of the offense to be, or on whether it gave jurisdiction to punish in the place where the letter is delivered? It would have been precisely as much of a *decision* to have stated that punishing those who misused the mails was sound public policy; or to say that federal courts had jurisdiction to punish violations of

Section 215, and that Congress intended them to have such jurisdiction. It was a statement on a point not presented by the appellant, at no time contested by him, and upon which no argument was made or brief submitted. It was a bald departure from the only question presented for decision. That the remarks of a court under such conditions are not binding law, are not *stare decisis*, and are in no sense a precedent, the law leaves little room for doubting.

In *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. Rep. at 23, it is stated to what the writer of the opinion in *Wales v. Whitney*, 114 U. S. 564, was speaking and thereupon:

"But the question of jurisdiction does not appear to have been contested in *Wales v. Whitney*, and where this is so the court does not consider itself bound by the view expressed therein." Citing *U. S. v. Sanges*, 144 U. S. 310; *U. S. v. Move*, 3 Cranch. 159, 172.

This is followed in *King v. Hospital*, 64 Fed. 341. And the case of *Shoshone v. Rulter*, 67 Fed. at 810, treats two decisions as *dicta* because in them the question of jurisdiction was not raised.

A court is not bound by expressions in its former decisions on points which were not contested. *Adams v. Yazoo* (Miss.) 24 So. 201.

There is no binding decision which deals with a point not presented. *Scottish Ins. Co. v. Wade*, 127 S. W. 1186, 1189; *Mulford*, 32 Cal. at 139; *Lewis*, 6 Munf. 87; *Ingham*, 128 Pac. 675; *Buchner*, 60 Wis. 264, 19 N. W. 56, 57; *Rush*, 25 Pac. 816, 825, 826.

A pronouncement on a point which appellant failed to notice and on which no argument or authorities are presented, is *obiter*. *Lyman*, 161 N. Y. 119. In *Rohrbach*, 62 N. Y. 47, 56, it is said that "dicta are opinions of a judge, * * * made without argument or full consideration of the point." And First Bouvier, p. 568, says of this definition that "probably no better definition can be found." So does *Newman's case* (W. Va.) 57 W. Va. 98, 49 S. E. 926, 931, and see *Brown*, 102 Wis. 137.

Grand Division II.

South Dakota has no jurisdiction because neither defendant was at any material time within that State—and under this indictment, neither constructive presence nor the continuous offense statute, Sec. 731, R. S., is involved.

We concede there are cases where the fact of physical absence is immaterial. Conspiracy may be such a case. But here no conspiracy is charged. A case coming within Sec. 731, may be one. But here the offense if any was completed in Iowa.

What the general rule is is clear:

While it is true that one may be a fugitive from justice even before he is formally accused—*Streep*, 160 U. S. 128, 16 Sup. Ct. at 246, 247, and while it is immaterial with what intent he fled—he cannot be said to flee from the justice of a state if he was never in that state. He becomes a fugitive only by voluntarily withdrawing from a state in which he has committed an offense. To constitute his fleeing from the justice of a commonwealth this must be true:

“He must have committed a crime in the (demanding district) and when sought to be tried by the court having jurisdiction have left the district and be found in another state and district, under circumstances indicating a purpose to evade the authority and jurisdiction of the local courts—*Greene v. U. S.* (C. C. A.) 154 Fed. at 411. (Citing *Streep*, 160 U. S. 128, 16 Sup. Ct. 244.)

In *Graham's* case, 216 Fed. at 815, 816, it is said that in the *Appleyard* case, 203 U. S. 222, 27 Sup. Ct. 122, the Supreme Court sums up all its holdings on the point as follows:

“A person charged with crime against the laws of a state and who flees from justice, that is, after committing the crime, leaves the state, in whatever way or for

whatever reason, and is found in another state, may, under the authority of the Constitution and laws of the United States be brought back to the state in which he stands charged for the crime, to be there dealt with according to law."

It is said in *Kurtz v. State*, 22 Fla. 36, citing *In re Mohr*, 49 Ala. 63, that the accused may show on *habeas corpus* he was not in Pennsylvania when the crime is alleged to have been committed, nor since, and that he never fled from Pennsylvania and, therefore, is not a fugitive. To like effect is *In re Adams*, 7 Law Rep. 386.

It is essential that he depart from the state after being indicted therein, and is then found in another state. (*Hibler v. State*, 43 Tex. 197, 201.)

Essential, that he has withdrawn from the accusing jurisdiction without awaiting to abide the consequences of his act. *In re Voorhees* (23 N. J. L. 141, 150).

He must go into a state, commit a crime, and then go elsewhere. (*Kingsbury's case*, 106 Mass. 223; *Ex Parte Succaringer*, 13 S. C. 74.)

In *Jones v. Leonard*, 50 Iowa, 106, it is held that a citizen and resident of Iowa who is charged with having been constructively guilty of an offense in another state upon which a requisition is based, but who never in fact has fled therefrom, is not a fugitive from justice within the meaning of the Constitution.

The words "who shall flee" must be taken "in their natural and obvious sense, and do not include a case of constructive presence in the demanding state, and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding state at the time he commits the act of which complaint is made." *Wilcox v. Nolze*, 34 Ohio State, 520.

The case of *In re Fetter* (N. J.) 57 Am. Dec. 383, cites all the foregoing and approves them.

Each defendant testified that at no material time mentioned in the indictment was he within South Dakota (42, 43-342).

Whatever be the effect of the indictment, it is open to criticism and contradiction. (*Dana*, 68 Fed. at 896, 897, 890, 943.)

In the *Dana* case, 68 Fed. at 890, reference is made to a Louisiana decision which deals with a conspiracy and in which "proof was admitted before the Commissioner to show that defendant was not in Louisiana at the time alleged." In the *Fowkes* case (C. C. A.) 53 Fed. at 165, the court said:

"It is certain that none could have been committed of which the United States court of Missouri had cognizance. The accused had never been within that state."

True the indictment asserts by way of conclusion that the offense was committed in South Dakota. But the allegations of a pleading have no evidentiary force except that in removal proceedings it is by exceptional grace, admissible as evidence. But surely its conclusions cannot overcome affirmative testimony in opposition to such conclusion, where such testimony is not impeached, and is disputed by nothing save such conclusion.

In the *Morse* case, 287 Fed. at 915, 916, it is ruled that where testimony consisting of the allegation of the indictment is put in in a removal hearing in the District Court, and counter testimony is, as here, undisputed except by such allegation, then such testimony, as matter of law, overcomes any effect the indictment is justly entitled to in the removal proceedings.

Even where an allegation in a pleading is given some sort of evidentiary aspect, it is not stronger evidence than certain so-called presumptions—say, that a deed found in the possession of a grantee has been delivered,

or that the statements in a pleading filed were authorized by the client. As to these it has been generally held that where "a mere inference of fact is met by undisputed testimony that the facts are contrary to the inference, there is no conflict to go to a jury." In other words, such inference or so-called presumption, is, as matter of law, overcome by such testimony. See *Farmers Company v. Company*, 184 Iowa, at 780; *Mohn*, 181 Iowa, at 129; *Kauffman*, 187 Iowa, at 681; *Butler*, 186 Iowa, at 1254; *Schaefer*, 133 Iowa, at 209.

So, even if it were competently charged that Section 215 had been violated, such allegation is as matter of law overcome by undisputed testimony found in this record showing that defendant was at no material time in the district of South Dakota.

2.

We again admit that absence from South Dakota might be no defense if this case comes within Section 731, R. S., which provides for elective venue if an offense is begun in one district and "completed" in another—which on the very words of that statute means acting in part in both districts. We have no quarrel with this statute. What we urge is that it is and has been held to be inapplicable here. Our position is that the offense charged is the mailing in Sioux City, that that act was completed there—and that where one offense is "completed" in one district it cannot be "completed" in another—that the statute does not apply because a completed act cannot again be completed—and that any legislative or judicial attempt to prosecute in one district for an act completed in another would violate the Constitution. (12 Cyc. 241, 242.)

The indictment charges no act save mailing in Sioux City (22-342), and that the statute was breached by said

mailing (41-342). The offense completed there, the statute gives no right to prosecute in South Dakota.

It was completed in Iowa, because "causing" is mailing—and the mailing, and therefore, both mailing and causing were done in Iowa. The alleged offense was completed in Iowa because it has been held, in construing Section 215 as amended, that the mailing is still the gist of the offense and the act which alone gives jurisdiction to the federal courts. *Olsen* (C. C. A.) 287 Fed. 89; *Badders*, 240 U. S. 391; *DeBara*, 179 U. S. 316; 21 Sup. Ct. at 112; *Henry*, 123 U. S. 372, 8 Sup. Ct. at 142; *Francis*, 152 Fed. at 156.

It is self-evident that since the act of mailing is a complete offense and gives the jurisdiction, nothing is "continued" after the mailing is done—that, therefore, mailing cannot be a continuous offense unless the one who mails, unlike the defendant, is charged with doing something to help delivery after he has done the mailing. Of this, more, elsewhere.

It is *stare decisis* that Section 731 does not apply to a misuse of the mails. That statute was raised on the record of the *Stever* case and if the court had thought its venue provision applicable, it could not have held, as it did hold, that there was no jurisdiction to prosecute in the district of delivery. It held of necessity that Section 731 was not applicable because if it were, there was right to prosecute in Kentucky; and a holding that Section 731 applied would have necessitated holding that venue lay there, instead of the decision that it did not.

It has been squarely decided that misuse of the mails is not a continuous offense. *In re Henry*, 123 U. S. 372, 8 Sup. Ct. at 142, approved in *Badders*, 240 U. S. 391; *DeBara*, 179 U. S. 316, 21 Sup. Ct. at 112; *Fowkes* (C. C. A.) 53 Fed. at 17; *Francis*, 152 Fed. at 156.

In effect, the instant case does not differ from the case of *Fowkes*, *supra*, one in which a voucher was signed in one state and a rebate was thereby caused to be paid in another, and where it was held that the venue lay in the state where the voucher was signed.

Part 2-a.

SECTION 731 DOES NOT DEAL WITH CASES WHEREIN AN ACT COMPLETED IN ONE DISTRICT HAD INJURIOUS CONSEQUENCES IN ANOTHER. SO FAR AS IT IS CONCERNED, ITS FUNCTION ENDS IF THE ACT ITSELF BE COMPLETELY DONE IN ONE DISTRICT.

The *Fowkes* case, 53 Fed. at 17, which ruled that Section 731 did not apply, was a case wherein it should be applied if it be the fact that mailing constitutes a continuous offense. Fowkes signed an instrument in Philadelphia which authorized some one in Missouri to there grant an unauthorized rebate. The court declined to remove Fowkes to Missouri because even if the act of signing first became effective in Missouri the signing was an act completed in Pennsylvania. Had the court deemed such signing, plus the injurious consequences which occurred in Missouri, to constitute a continuous offense, it would have ordered removal to Missouri—and by refusing such order the court necessarily held that though the act completed in Pennsylvania first became injurious in Missouri this would not make the act done in the first state a continuous offense completed in the other. The court said:

“But it has been argued that the offense charged though begun in the Third Circuit was completed in the Eighth Circuit and that therefore under 731 R. S. it might be tried in either. In our opinion, however, the facts of the case do not bring it within the terms of the operation of that section.”

In the opinion rendered by Justice James in the case of *U. S. v. Guiteau*, 1 Mackay, 544, 545, and also by Justice Hagner, in the same case (pages 553, 554) both express the opinion that the constitutional provision is to be interpreted on grounds "independent of the common law," and with reference only to the "place where the manifest act of the defendant was done"—"where his active agency was employed"—and that it "forbids trial in a district where the ultimate consequences of his act happened, but where he does not act." (And see Cooley, Const. Lim., 320 note.)

The *Dana* case, 68 Fed. at 888, approves the statement of Judge Cooley that in the light of the fact that one cause of the revolution was the assertion of a right to send parties abroad for trial, it would be remarkable—"if it should now be found an editor may be seized anywhere in the Union and transported by a federal officer into every territory in which his paper may find its way, to be tried each in succession, for offenses which consisted in a single act, not actually committed in any of them."

Applying the foregoing to the concrete case and it follows that where the only *fact* charge is a mailing done in Sioux City, a mailing there completed the offense. That the injurious consequences first came into existence in South Dakota cannot change the truism that an act completed in Iowa cannot be further "completed" in South Dakota.

It all sums to the proposition that Section 731 does not touch what is completed in one district. The very words of the statute leave no room for any other interpretation. It deals only with offenses that are "begun in one judicial district and completed in another." Manifestly, this makes alternative venue depend on acting partly in one district and partly in another. Cases that

apply the statute exhibit such double action. See *Putnam*, 62 U. S. 687; *Davis* (C. C. A.) 104 Fed. 136; *Buell*, 3 Dill. 116; *Conrad*, 59 Fed. 458; *Belknap*, 96 Fed. 614. The test is not where the act done first attained criminality or became injurious, but whether the defendant acted in more than one district to accomplish a completed offense.

Part 2-b.

IF CONSEQUENCES MADE VENUE, UTTERLY ABSURD PROCEDURE WOULD BE SANCTIONED.

If the fact that the consequence of the mailing in Iowa was a delivery in South Dakota permits prosecution in the last named district, it must be held that the consequences of an act as well as the act from which the consequences flow fix the place of trial. The adopting such a theory would have startling results.

The Supreme Court well said in a recent case:

"The government, however, contends that 'with few exceptions every crime has continuity.' But the law, being essentially practical, does not regard every crime as continuous for the purpose of jurisdiction. * * * For practical purposes it usually suffices to punish where the actor began."

If said declaration of the Supreme Court does not state the true rule as to venue, utter absurdity in fixing a place of prosecution would be sanctioned. Any offense completed in one district could be prosecuted in any other wherein said completed act was followed by its natural consequences. If that is the law why has removal to the district of delivery been refused in libel prosecutions? Why was there the pronouncement that was made in the *Guiteau* and the *Dana* case?

On the theory that the effect creates venue, a seduction committed in Iowa would be punishable where the child

of the seducer was given birth. Counterfeiting done in Missouri could be punished in Iowa if the counterfeiter intended that his product should be and it was floated in Iowa by an innocent agent. For a note forged in one state the forger could be prosecuted for the forgery in any state where the note was uttered. In a word, every time an act was completed in one district prosecution would lie in any other district wherein occurred any result of what was completed in the first. The mere suggestion makes plain why "for practical purposes it usually suffices to punish where the actor began," and that prohibiting the causing of delivery will on no permissible construction permit punishment in the district where delivery, not caused therein, occurred.

To repeat—this would nullify.

Whatever was true at common law under our constitution, prosecution must be had "where the manifest act was done or his act or agency was employed." And defendant may not be tried "for offenses which consisted in a single act" in some district in which that act was "not actually committed." Guiteau; Mackay, 544-45-53-54; Cooley Constitutional Limitations *320 (Note).

And the analogy of the case of firing a shot on one side of the line that kills on the other side, is faulty. In that case the ultimate crime is the killing. And it is clearly done by an act begun in one place and completed in another. The firing of the shot is, of course, not the murder. At the time it is fired no murder has been done. The result of the shot, the killing, is done in the territory in which the bullet strikes. A better illustration is to suppose a statute which prohibits the firing of a weapon with intent to kill. In that case the firing would complete the offense denounced, and that would be so though the consequence of the prohibited act occurred elsewhere.

Part 2-c.

THE LEGISLATIVE CONSTRUCTION IS THAT SUCH WORDS AS "CAUSE TO BE DELIVERED" WILL NOT CREATE ELECTIVE VENUE EITHER ON THE THEORY THAT SUCH CAUSING IS A CONTINUOUS OFFENSE, OR ON ANY OTHER THEORY.

The lottery statute has the words "causing to be delivered." If thereby a continuous offense was created that fell within the alternative venue provision of Section 731, what need was there to insert in addition to the quoted words an express provision for elective venue.

The Mann Act has the equivalent of those words, to wit, it prohibits "causing to be transported," etc. If "causing" created alternative venue by means of being a continuous offense, it was idle to put into this act an express provision giving elective venue.

Division II.

It is *stare decisis* and is the fact that the doctrine of innocent agency has no application. For even if an innocent agent made delivery in South Dakota, the causing delivery, i. e., inducing the agent to act, was, so far as defendant was concerned, done by mailing in Iowa.

Stare decisis disposes of the innocent agency theory. If that doctrine were applicable, it was just as fully so in the *Stever* case, and in the *Stewart* case, 119 Fed. 89 (C. C. A.); and both of these hold that venue lay in the district of mailing, only.

What follows is in a sense of repetition of what has already been elaborated, to wit, that "causing delivery" is not delivery—and that, therefore, the venue lies wherever the "causing" is done.

Grant, for the sake of argument, that steps to bring about delivery, taken by an agent after the principal has deposited, would make the principal guilty whether the agent acted knowingly or innocently, it still remains true that the agency is created and set in motion only by the depositing; that, therefore, even if the principal procured an innocent agent to take steps that would result in the delivery, the creation of the agency and causing the agent to deliver necessarily took place where the acts were done that induced the agent to do what brought about a delivery.

We hope that this point will not be dealt with under a misapprehension of our exact position. We do not claim that a guilty principal can escape because he has accomplished his wrong by using an innocent agent. What we have is not a question of *respondeat superior*, but of venue. Delivery is not punishable, causing it is the offense. Causing delivery by an innocent agent is, under the indictment at bar completed when such agent is employed to deliver and is punishable only where he was employed. To be sure, if after employing the employer does something more to cause the agent to make the delivery, prosecution might lie where that additional thing is done; but that is moot. So far as this indictment is concerned defendant stopped after he had caused delivery; after the act of employing (mailing) done in Sioux City.

Grand Division III.

Where an indictment is returned in a division in which no offending is charged, such an indictment is void because of the provisions of Section 53 of the Judicial Code—and such an indictment cannot base a removal.

South Dakota has a Western Division and a Southern Division. (Judicial Code, Sec. 106.)

The indictment shows on its face that it was found and presented in and by a grand jury sitting for the Western Division. It charges that the offense was committed “within the Southern Division.” (14-342, 3rd par.)

Section 53, Judicial Code, provides that “all *prosecutions* shall be *had* within the division of such district where the same were committed.”

Our contention is that “prosecutions” includes both indictment and trial—wherefore the provision that prosecution is to be had in the division in which commission is charged commands that indictment must be returned there. The view of the *Biggerstaff* decision, 260 Fed. 926, is that said word deals only with the proceedings after indictment, that therefore, there is no provision as to the place of indicting, and that, so, it is permitted to indict in any division of the district. Said decision declares:

“The point made turns upon the meaning of the word ‘prosecutions’ as employed in the statute—whether this word includes the finding of the indictment.”

It holds that the word as used in this statute does not include the finding and return of the indictment, but refers only to the proceedings that follow “the making of the accusation.”

The conclusion is that the word is used in Section 53

"in this restricted sense," though it is conceded that "in other relationships it may have a broader meaning."

The point at issue, then, is, whether the word "prosecution" as employed in Section 53, does or does not include the finding of the indictment.

Criticisms of the *Biggerstaff* decision are reserved for another place. For the present, we shall proceed as if said decision did not exist. And we go at once to the decisions that hold, and the reasoning that supports a holding, that Section 53, Judicial Code, renders the indictment at bar void; and go also to a consideration of what effect its being void has.

The *Beavers case*, 194 U. S. 85 (top), rules:

"And the place where such inquiry must be had and the decision of the grand jury obtained, is the locality in which, by the Constitution and laws, the final trial must be had."

Ex Parte Morgan, 20 Federal, at 308, is an extradition proceeding. In such, the prosecution has greater rights than the government has a proceeding to remove under Sec. 1014 R. S. What is said in the *Morgan case* is approvingly quoted in *Ex Parte Cheatham*, 50 Tex. C. R. 51; 95 S. W. 1077, 1081—and it is this:

"There is nothing on the face of the papers which were before the Governor to show that a Court in the Cherokee Nation had jurisdiction to try Morgan for the crime of murder. It must appear to the Governor honoring the requisition that the tribunals of the demanding state or territory had jurisdiction to try, or else how can a charge of crime be legally made. Charged with crime, in legal parlance, means charged in the regular course of judicial proceedings. A man cannot be legally charged with crime when there is no jurisdiction to try him. The fact that he is so legally charged, means that he is charged by an authority having a right to try."

* * * There should be no extradition, because it does

not appear "that he could be tried by the courts of the Cherokee Nation."

In the case of *Christopherson*, 261 Fed. at 926, it is said:

While it is charged that the corporation has its chief office and place of business "in the division and district wherein the indictment in this case was found, it is not obvious nor is it plainly charged that the offense for which the defendants here stand indicted occurred in said *division* and district."

The case of *U. S. v. Chennault*, 230 Fed. 943, holds, on the authority of *Post v. U. S.* 161 U. S. 583, 16 Sup. Ct. 611, and *Virginia v. Paul*, 148 U. S. 107, 13 Sup. Ct. 536, that, because of Section 53, Judicial Code, an indictment cannot now be found in a division other than the one in which the offense was committed.

Atwell Criminal Law and Procedure—

Notes the conflict between the case of *Chennault* and that of *Biggerstaff*; says it would seem the *Chennault* case gives the correct rule; that, at any rate, cautious defenders will never allow their defendant to go to trial on an indictment found in a division other than that of commission—and that the basis for this declaration is not only a resting on statute but, by implication, on the Constitution.

The statute construed in the *Post* case, 161 U. S. 583, is:

"Criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the District of Minnesota shall be brought, had and prosecuted in the division of said district in which such offenses were committed."

The provision of Section 53, Jud. Code, is:

"All prosecutions for crime shall be had within" the division of commission.

The *Post* decision is that under the first statute, the one construed in it, the return of indictment in the wrong division goes to the jurisdiction of the court. In *Rosecran's* case, 165 U. S. 257, 17 Sup. Ct. at 304, it is said:

"Some of these later acts specifically limit the jurisdiction in criminal actions to the courts held in a division of the territory in that division,"—and, that while this was not so under an earlier Minnesota statute, on the authority of the *Post* case, said last statute so limits jurisdiction.

Dwyer v. U. S. 170 Fed. 163, speaks to the *Rosecrans* case and repeats what has just been quoted. (See page 64.)

The *Chenault* decision asserts that the statute construed in the *Post* decision, and Section 53, are identical. We believe that assertion to be true and that we can demonstrate that the two statutes are for all practical purposes identical—and that, therefore, the *Post* case rules the one at bar. If both statutes had the words "criminal proceeding," etc., or both had the words "or prosecution for crime," it would not be denied that a construing of those words found in one of these statutes, would be a construction of the same words found in the other. It is equally undeniable that a construing of words in one statute is a construction of words of like import found in another statute.

In terms, there are two differences between the statute construed in the *Post* case, and Section 53. The one construed in the *Post* case deals with "criminal proceedings instituted for the trial of offenses"; Section 53, with "prosecutions for crime." This difference creates no distinction, for of course, while criminal proceedings instituted for the trial of offenses may include more than prosecutions for crime, surely every prosecution for crime is a criminal proceeding.

"The well understood legal significance of the word 'prosecution' is a criminal proceeding at the suit of the Government." *Tennessee v. Davis*, 100 U. S. at 269, top par.; *Ex parte Fagg* (Tex. Cr.), 44 S. W. at 297, 2nd par., right col.

"The word 'prosecution' * * * usually denotes a criminal proceeding." Miller, J., in *Ulrich*, 3 Dill. 532;

Matthews, 23 Fed. at 75; *Reisinger*, 128 U. S. 398, 9 Sup. Ct. at 101, at top, right col.

The second difference is that while Section 53 deals with prosecutions for crime that are "had" within the division of commission, the statute construed in the *Post* case has the words "brought" as well as "had."

It is difficult to understand how a criminal proceeding or prosecution may be "had" unless it is "brought." It would seem that using the word "brought" in addition to the word "had" is mere tautology—is, at any rate, merely the exercise of an abundance of caution. (Something sometimes found in statutes—*Lennon*, 150 U. S. at 398.) The very word "prosecution" proves that much. It is hard to believe that the word refers to the middle of the proceedings, to wit, the trial, and to the end, to wit, the conviction and sentence, but has no reference to the beginning, to wit, the bringing of the accusation. It is naturally difficult to find case law for so self-evident a proposition, but the case of *Whitney*, 1 Hill (N. Y.) at 663, comes close. Its reasoning fairly holds that the "persisting in and carrying on" the suit makes a liability for costs under a statute imposing costs upon one who "brings" the suit—one way of saying that the commencement of, is part of the suit.

Division II.

If the Post Case Had Never Been Decided, It would Still Be True That Under Section 53 an Indictment Is Void Unless Returned in the Division Wherein Offending Is Charged.

Though Section 53 does not have the word "brought," it still commands that whatsoever is a prosecution for crime, shall be *had* within the division of commission. Without reference to the *Post* decision, it is the law that

statute-made divisions are for practical purposes a sub-district, and, therefore, that return of indictment with reference to division is governed by the same requirements that obtain with reference to the return of indictments as between districts.

In the *Goldman case* (C. C. A.), 271 Fed. 843, it is said:

"The acts of Congress treat the divisions of a district unless otherwise provided, as separate districts, for jurisdictional purposes."

In the *Rosecrans case*, 165 U. S. 257, 17 Sup. Ct. at 304, it is said:

"Some of these later acts specifically limit the jurisdiction in criminal actions to the court held in a division of territory within that district"—and while this was not so under earlier special acts dealing with Minnesota, the statute construed in the *Post* case so limits jurisdiction.

To like effect is *Dwyer v. U. S.* 170 Fed. at 163. In Section 51, Rose, Fed. Indictments, it is said that Congress has in various ways, to accomplish that purpose, established in two-thirds of the district what are legally known as divisions and which for some purposes are sub-districts; that by other acts the divisions were made so distinct that each of them was in fact a subdistrict—and that the *Chenault* case rules Section 53, Judicial Code, gives that status to all divisions, and rules that said statute had given to all divisions the status of a district where, before, some of them did not possess it.

We start, then, with the proposition that the indictment must be returned in the division of commission for the same reason that it must be returned in the district of commission—that the statute-made division is for jurisdictional purposes a subdistrict. If that be so, an indictment returned in the wrong division is as much a nullity as one returned in the wrong district.

The same result is reached if Section 53 commands the

indictment to be returned in the division where an offending is charged. If that be its command, a disobedience to it makes the indictment a nullity. It is elementary that divisional jurisdiction depends upon express legislation. *Barrett*, 169 U. S. 218, 18 Sup. Ct. at 327, 329; *Rosecrans*, 165 U. S. 257, 17 Sup. Ct. at 304, 305; *Dwyer*, 170 Fed. 160, 164. Not only does the jurisdiction depend upon such grant, but it is limited to whatever grant is given. That, too, is elementary, because federal courts have no jurisdiction except such as is granted. *Hopkins*, 199 Fed. at 651. Section 53, Judicial Code, is an express grant of power dealing with the return of indictment. The terms of the grant are that prosecution shall be had in that division. So if "prosecution" includes "indictment," then, without reference to the *Post* case, indictment must be returned in the division of commission.

Most exhaustive research has failed to find a single decision wherein it was so much as intimated that the presenting of the indictment is not, at least, a part of a criminal prosecution.

It is settled that it is a part of such prosecution.

In *State v. Williams*, 24 La. Ann. 1200, it is held that a prosecution is pending "from the moment the papers in a criminal case are returned to a criminal court," and it is said that this is true because from then on "the accused is under the consideration of that court whence he cannot be removed or released but by order of that court." That being so, it is not surprising that the presentment of indictment is universally held to be a prosecution or at least a part of one.

"Standing by itself, prosecution has a larger significance than indictment."—*Haas*, 57 Pa. St. at 445; 32 Cyc. 728. But that is immaterial. For though prosecu-

tion may mean more than indictment, it suffices that indictment is included in the definition of prosecution.

"An indictment is a prosecution."—*Haas*, 57 Pa. St. at 445; 32 Cyc. 728. While, to be sure, to "prosecute" means to make complete prosecution, in that, is included the institution of suit.—*Davis* (Mich.), 111 N. W. at 777. And the meaning of prosecution is not limited to what carries on the suit until a remedy is obtained.—*Clinton* (Kansas), 55 Pac. 854. "Prosecution" includes the institution or commencement thereof.—32 Cyc. 728. And while prosecution is also the continuation of a criminal suit, it is still "the institution or commencement of it."—32 Cyc. 728. Indictment is the whole or any part of the procedure provided by law for bringing offenders to justice. 32 Cyc. 728; *Fagg* (Tex. Cr.), 44 S. W. 294. It is one part of a prosecution—a part "of one constitutional proceeding for bringing the accused to trial."—*Dana*, 68 Fed. at 895. It is one of four methods of prosecuting.—*Bish. New Crim. Proced.* (4th Ed.), Sections 129a, 130; 12 Cyc. 290. The Constitution of Louisiana (1913) commands that prosecution shall be by indictment or information; and Article 1, Constitution of New York, that a crime "must be prosecuted by indictment."

Indictment is the institution of a criminal proceeding, because a grand jury cannot inquire except in the place of commission—wherefore, crimes must be prosecuted there.—1 *Bish. New Crim. Proced.* (4th Ed.), Section 129. And see *Beavers*, 194 U. S. top 85. The making of an accusation is the first act in a prosecution.—*Bouvier*, 710. In *First Bishop New Crim. Proced.* (4th Ed.), Section 129a, indictment is dealt with under the head of "The county or district of prosecution," and it is declared that the matter dealt with is the jurisdiction of the courts with reference to the territory in which the proceeding "is to be instituted."

No prosecution is commenced until there is an indictment.—Paul, 148 U. S. 107, 13 Sup. Ct. 539, 541, 542, in approval of a statement by Mr. Justice Grier. Speaking to “costs of prosecution” it is said in *Smith’s* case, 240 Fed. at 757, cited in the *Post* case, that there is no “cause” in the court until indictment is filed. And according to the case of *Beavers*, 194 U. S. 85, 24 Sup. Ct. 607, left col., 3rd par., the Constitution requires an indictment “as a prerequisite to a trial.”

Since indictment is a prerequisite to trial, that is, there can be no trial without indictment, and since trial is confessedly covered by “prosecution,” indictment must be a part of a prosecution, and, therefore, of a criminal proceeding. And in defining the term “prosecution” there is no more right to disregard the first part of it, than to disregard the middle or the last. Of course, trial and sentence are parts of a criminal proceeding. But not more so than the institution of the proceeding, the indictment. And what is true of such proceeding is as true of a prosecution. Wherefore, in holding as to a criminal proceeding that the indictment must be returned in the division of commission, the *Post* case decides as well that the indictment in a prosecution must be there returned.

In a word, as a prosecution is a criminal proceeding, whatever is decided as to such proceeding is also decided as to a prosecution. Whatever governs the beginning of a criminal proceeding governs the beginning of a prosecution.

Part 2-a.**OTHER REASONS WHY "PROSECUTIONS" IN SECTION 53
INCLUDES THE RETURN OF INDICTMENT.****a.**

If Congress intended by using the word "prosecute" to exclude indictment, it intended what is an exception to the usual meaning of that word. The claim is that it created such an exception by using said word. Surely, that has not been the manner in which it usually has made exceptions. As said in the *Rosecrans case*, 165 U. S. 257, 17 Sup. Ct. 305 (top), Congress is not to be held by implication to have changed the law where it appears that it "in some cases has made express provision for effecting a change."

It is "an old and familiar rule" that a general rule stands until an exception is specifically engrafted upon it. See the case of *Chase*, 135 U. S. 255, 10 Sup. Ct. at 757, 758. Nothing in Section 53 of the Judicial Code indicates any intention to take the divisions of South Dakota out of the general rule established by Section 53. It is an equally familiar doctrine that when an exception is adopted, this amounts to legislative construction that before the latter enactment no such exception existed. For, of course, it should not be held that a specific exception later created was but intended to repeat some part of a pre-existing general statute. *Chase*, 135 U. S. 255, 10 Sup. Ct. 758 (right column), par. 1.

It will be difficult to reconcile what was done later than the enactment of Section 53, with the position that Section 53 permitted a transfer in all cases, including one from a division in which no offense was committed to the one in which the offending was charged.

Now, Sections 92 and 100 of the Judicial Code, respectively, provide for transfer from one place of sitting in

Montana to others; and that a sitting in Dayton, Ohio, may deal with all prosecutions for offenses committed in any part of the district in which Dayton lies. Manifestly, these two sections which are later than Section 53, do, and for the first time, create exceptions to Section 53. Congress must have been of the opinion that the general rule of Section 53 had no exceptions, else it would not have later enacted Sections 92 and 100. It evidently thought it necessary to authorize by these later statutes something which could not be done under Section 53. It follows that when it gave a permission that a sitting in Dayton might deal with all prosecutions for offenses committed in any part of the district in which Dayton lies, it declared thereby that no general venue existed under Section 53. It is equally clear that in providing for transfer limited to between places of sitting in Montana, it thereby declared that with the exception of Montana, transfers should still be governed by Section 53. If these interpretations be unsound, then it must be held that Sections 92 and 100 were not intended to accomplish anything—were intended merely to govern subjects fully covered by Section 53—had for their object to permit in particular instances what was already permitted in all cases. Of course, it is one accepted canon of construction that no presumption will be indulged that the legislature intended to do something that it was idle to do.

b.

The statute construed in the *Post* case dealt with nothing but “criminal proceedings for the trial of offenses against the laws of the United States.” “Criminal proceedings” includes “prosecution for trial.” The statute construed in the *Post* case then dealt with nothing but such prosecutions. Yet the point decided was where was the proper place for the return of an indictment. If indictment is no part of a criminal proceeding nor of a

prosecution for crime, why did the Supreme Court decide what it did?

On the theory of the *Biggerstaff* case, the decision should have been that the indictment was no part of a criminal proceeding or of a prosecution for crime and that, therefore, the statute in review did not deal with indictment, at all. Therefore, and on that theory, the court should not have determined whether an indictment lodged in one division rather than in another was one which the court had no jurisdiction to entertain. Instead of that, it declared that the division was material. It makes no difference that by possibility the statute construed differs from Section 53. The court did deal with division lines. It held that such lines were vital on the place of returning indictment. It therefore held of necessity that an indictment was referred to in a statute dealing with nothing but criminal proceedings, *i. e.*, prosecution for crime.

c.

On every theory *trial* must be had in the division of commission. (60, *ante*.) It would seem to follow the indictment must be returned in that division, for otherwise defendant could put in bail, refrain from moving a transfer to the division of commission and thus be never tried; for on no theory may he be tried in a division other than the one of commission, except on his motion. Whatever may be claimed for the place at which indictment may be returned, there can be no claim that trial can be had except in the division of commission, unless it be on the application of defendant. It follows inevitably that the true construction of Section 53 is that it contemplates both indictment and trial in that division, with permission for the defendant to have the trial moved from that division into some other. On this construction, the failure to have trial becomes impossible. If the indictment is re-

turned where it may lawfully be, then, though defendant moves no transfer, he may lawfully be tried where lawfully indicted. Unless that is the true construction, defendant has the privilege of preventing being tried. If he does not exercise the right to have transfer, which right he alone has, he will on the theory of the *Biggerstaff* decision be lawfully indicted where he cannot be tried, unless he moves a transfer. That cannot be the true interpretation of a statute command that prosecution must be had in the division of commission.

d.

Whatever "prosecution" may mean, the statute does provide that it shall be had in the division of commission "unless" defendant has "the cause transferred for prosecution" to another division of the district. We contend that no one can have a transfer except *from* the division where the indictment is rightly brought to some other division. Be that as it may, no one but the *defendant* can have a transfer, and his right is created by his being a defendant. There is no defendant until the prosecution has been initiated; and in felony such prosecution can be instituted by indictment only. Giving a defendant the right to transfer, necessarily presupposes that he must first be made a defendant. The return of the indictment gives him that status. It is the existence of a prosecution that makes him a defendant. Therefore, the indictment is a prosecution, even in Section 53. For it is that statute that gives the right to transfer, and it gives it only to one who has been made a defendant, because indicting him has caused him to be under prosecution.

e.

Again, the annotators to Section 53 made a report accepted in the *Biggerstaff* decision, and to the effect that

a certain Arkansas Act was in some manner put into Section 53. That act deals in terms with *both* indictment and trial. If it was the purpose that Section 53 should not deal with anything but trial, it was not only idle to include the Arkansas Act, which dealt with both indictment and trial, but the inclusion injected into Section 53 a contradiction. That is to say, on that theory, Congress put into the new statute a provision dealing with both trial and indictment, with the intention that the new statute should apply to nothing but trial.

f.

Who has ever contended that a valid indictment might be returned *in a district other than the one of commission*? And yet the Constitution has an express limitation to trial which is not found in Section 53. In other words, there is much more reason for claiming that indictment may be returned in a district in which no offense was committed—that the limitation is merely that trial shall be had in no other district—than there is for claiming that though here the word “trial” is not used in the division limitation, that yet that limitation refers to trial, only.

Section 53 uses the word “prosecution” and it must be conceded that usually that word includes both indictment and trial. Had that statute used the word “trial,” and no more, instead of the broader word “prosecution,” there would be stronger reason for holding with the *Biggerstaff* case that the limitation as to division applied only to proceedings subsequent to the accusation. But as said, it does not use “trial” but the broader, “prosecution.”

Article 3 of the Constitution, which provides in what district an offender may be proceeded against, uses the word “trial.” It declares that trial shall be held in the

state and district of commission. That affords a stronger reason for claiming that the limitation does not begin as early as indicting—a stronger reason for asserting the rule of the *Biggerstaff* case.

Part 3-b.

IT IS NOT THE HABIT OF CONGRESS TO DEAL WITH "TRIAL" BY INDIRECTION; NOR TO CREATE EXCEPTIONS TO THE SCOPE OF USUAL DEFINITION BY ANYTHING OTHER THAN PLAIN WORDS.

Legislative history discloses this:

Congress has not been in the habit of using "prosecution" as a synonym for "trial only." Section 59 Judicial Code provides for a transfer out of the division of commission, but it is found necessary to say that it is a transfer "for trial."

The Arkansas Act of June 2, 1906, gives a certain class confined in jail the right to be indicted and to be tried in a division other than the one of commission. But it does so by two parts, one of which says that the right is to transfer "to the end that trial may be had," and the other part, that the right is to have a transfer for submission to a grand jury for *indictment*. And the word "trial" is used in the act dealt with in the case of *Moran*, 27 Sup. Ct. 25.

The statute considered in Logan's case, 144 U. S. 263, 12 Sup. Ct. 627, provides that "all prosecutions in either of said districts for offenses against the laws of the United States shall be tried," in a described division. Evidently Congress did not in this understand that "prosecutions" fixed a place for trial, or it would not have added this express provision as to trial.

Article III of the Constitution limits the place of trial to the state of commission. But it does not make the regulation by using the word "prosecution." It uses

“trial,” in terms. The Sixth amendment exhibits a construction which declares that “criminal prosecution” regulations are not a fixing of a trial place, for it deals in terms with such prosecutions and adds the accused shall have “the right to be tried” in the district of commission. On the *Biggerstaff* theory, the only provision necessary was just that “criminal prosecution” should be had in such district. Evidently, the framers did not give “prosecutions” the definition of that decision or there would not have been made said addition fixing the place of trial, in terms.

Section 1014 provides for the arrest and detention of any person wherever found, but adds, in terms, “for trial” before the proper court.

Haas v. Henkel, 54 Law. Ed. at 473, 216 U. S. 462.

Section 53 does not have the word “trial.” No good reason appears for believing that the general course of plain expression was abandoned in enacting Section 53, and that there, for the first and only time, Congress used “prosecution” to signify “trial only.”

Division III.

We now reach the proposition that the *Biggerstaff* decision is so unsound as that it should not be accepted as a precedent.

It couples the holding that “prosecutions” usually includes indictment with the claim that, in Section 53, the meaning of the word is limited to the proceedings that follow indictment. For this extraordinary claim it cites no authority—and it ignores the *Post* case in this court and the *Chenault* decision by the District Court of the Eastern District of Louisiana. And surely, it strains construction against liberty, when strain, if employed at all, should be in favor of liberty.

If there is to be a straining at all, it should be to give the word its accepted meaning. As said in the case of *Hass*, 57 Pa. St. at 445:

"Astuteness must not be employed to negative or take away a defense granted by law to a party accused of crime."

In this case the court had to consider the effect of provisos, and found their existence indicated clearly that the term "prosecution" was intended to be a synonym for "indictment." In that connection, and as one reason why the provisos should be given said effect, it was said:

"An indictment is a prosecution though, standing by itself, prosecution has a larger significance."

In the *Post* case, 161 U. S. 583, it is said that in all cases where life and liberty is affected by proceedings before the court and on the question of its jurisdiction, "its authority in these particulars is not to be enlarged by any mere inferences from the law or doubtful constructions of its terms."

It is an elementary rule of construction that in dealing with jurisdictionals, statutes are construed strictly against jurisdiction. The *Biggerstaff* decision is a strained effort to construe a federal court into jurisdiction. (See 161 Fed. at 926.)

Part 3-a.

THE REASONING OF THE BIGGERSTAFF DECISION DIVIDES INTO MATTERS THAT ARE UTTERLY IRRELEVANT, AND TO REASONING FROM A FALSE PREMISE.

The *Biggerstaff* decision assigns a number of reasons. They utterly fail to give the decision any standing. For while what is given as a reason may be conceded to be a statement of what is true, it is also a statement of what is utterly irrelevant. The question was whether "prosecution" included indictment. These reasons have as

much to do with that question as if they had consisted of a statement that Columbus discovered America. These "reasons" are the following:

"If the indictment was lawfully found in the Omaha division, it was lawfully returned there."

That this is so of an indictment which *was* lawfully returned in a given division of course throws no light on whether a given indictment *was lawfully* found in the division where found.

"The return of an indictment is naturally made in the court and at the session where the grand jury is performing its functions."

On this, a grand jury sitting in Chicago can validly indict for an offense committed in Des Moines, because it made return where it was performing its functions.

"Except as to some fundamental requirements in respect to the Constitution and conduct of grand jury, the persons finally indicted are not entitled to subject their proceeding to the scrutiny and test of a trial."

What light does this throw on whether "prosecution" as used in Section 53 excludes indictment?

"There is no case or cause against the accused to be prosecuted" until accusation is made.

How does the fact, if it be one, that no prosecution exists *until accusation* is made by indictment, establish that the return of an indictment is no part of a prosecution?

"It is the process on indictment which brings them into court to answer the accusation."

That process on the indictment brings the accused into court to answer does not tend to establish that though indictment has been returned, no prosecution exists.

"The probability of commission of public offense and of the identity of the perpetrator may not be ascertained" until the grand jury finishes.

What has that to do with whether "prosecution" includes or does not include the return of the indictment?

The inquisition though essential is but preliminary "and is not a part of the definite prosecution of any particular individual."

Though it may be true that until the grand jury concludes the investigation it may remain unsettled whether there is probability that a public offense has been committed, and though before then the identity of the perpetrator may not be disclosed and it remain unsettled whether any particular individual will be properly subject to accusation, and though the precise nature of the offense and the offender are normally developed at the conclusion and not at the beginning of the grand jury investigation—what has uncertainty before indictment is returned to do with whether its return is or is not a part of a prosecution? Whatever doubt there may be until final action by the grand jury, by the time it *does* take such action, whatsoever it doubts, if any, as to the identity of the offender and the precise nature of the offense to be charged, have been resolved.

"Indictment is no part of the trial."

Dwyer, 170 Fed. 162, 163.

How does that prove that indictment is not a part of the "prosecution"?

b.

But the decision does make one argument which is relevant to its claim that "prosecution" is not used in Section 53 in its usual and accepted meaning both in law and by the layman. The basis of the claim is that a certain special Act dealing with Arkansas was included in Section 53. That Act enabled prisoners confined in the Fort Smith Division to obtain transfer for either indictment, trial or both, if unable to give bail and desiring to plead guilty. It is truly pointed out in the decision that if the sitting of the court in the Fort Smith Division was some-

time away, and the court was then sitting or soon to sit in a division other than Fort Smith, it was a benefit to prisoners in that situation and state of mind to be permitted to transfer to where they could at once be sentenced and enter upon their punishment. Because this was a benefit to this class, and it might be a benefit in some cases to permit transfer from one division to another, the decision bridges all gaps by declaring that Section 53 should be construed as this decision construes it, because, unless that be done, the advantage of such transfer would be lost. In other words, it might be beneficial in some cases, if defendant were permitted to obtain a transfer where he has been indicted in a division in which he did not offend. Therefore, to save this advantage, it should be ruled that under Section 53 an indictment may lawfully be returned in a division in which no offending is charged, to the division wherein it is charged. Now, it is obvious that the entire foundation of this benefit argument rests upon the assumption that Section 53 *does* permit a transfer *into* the division of commission. All this argument falls with the premise. Section 53 does provide for a transfer, but for none except one *out of* the division of commission.

It provides that the prosecution must be had within the division of commission *unless* defendant applies for a transfer "for prosecution" to "another division of the district." Now, if the prosecution must be had in the division of commission, unless the transfer is obtained, necessarily, it remains there until transferred—is there in the first instance. Being in the division of commission, it of course cannot be transferred *to* that division, for it is there to start with. The statute then is that the prosecution must in the first place be lodged in the division of commission, and the provision for a transfer is, of necessity, one not into but out of that division. But if

that were not enough, another provision of the statute makes the point too plain for argument. That provision is that when a transfer is ordered and the papers have been transmitted to the other division, "thereupon the cause shall be prosecuted within the said division in the same manner as if the offense was committed therein."

Now, clearly this deals with transfer from the division of commission. If it dealt with one to that division, the foregoing provision would not have been made. For, necessarily, the statement that the proceeding after transfer should be had in the division to which transfer was made as *if* the offense had been committed therein, is a declaration that the transfer is to a division other than the one of commission. As to the division of commission it would never have been provided that the prosecution in the division to which transfer was made, should proceed as if the offense had been committed therein. Obviously, the statute intends a transfer out of the division of commission, only, for if it had contemplated the division of commission, it would never have provided that the prosecution therein should proceed as *if* the offense had been committed therein. If committed at all, there is no "if" about it. Whatever was committed in the division where committed, *was* committed there.

c.

Much stress is laid in the *Biggerstaff* decision on the report of the annotators or codifiers on Section 53, wherein it is recited that the section includes many special acts and gives to all of them a general application. One of the acts included was an Arkansas Act, which provided that prisoners confined in Fort Smith, who were unable to give bail and desired to plead guilty, might have a transfer to a division other than the one of commission, for both indictment and trial. We submit that the report

as to inclusions is to be construed reasonably and cannot mean it was proposed that a number of these acts should be literally put into Section 53. That statute does not begin to have words enough to accomplish any such inclusion. Besides, if it were intended to literally preserve all that was to be "included in Section 53," there was no need for enacting that section. If it were to be merely a transcript of all pre-existing statutes *in pari materia*, those could be read where they were on the statute books already.

It was not intended by any inclusion to retain all that existed prior to Section 53, and to give each and all a general application; nor to make the rule of said Arkansas special act general by permitting a transfer for both indictment and trial to all defendants, even if they were not confined in Fort Smith, were able to give bail, and did not desire to plead guilty. There could not have been any literal inclusion because some of the acts said to have been included permitted a transfer for the purpose of indictment, while others, like the act construed in the *Post* case, forbade it. All of which sums that what Section 53 did was to merge all pre-existing statutes *in pari materia* in the sense of permitting to all defendants the right to move for a transfer out of the division of commission, and to fix as to all where indictment might be returned and prosecution had. In a word, what Section 53 comes to is to provide a general rule, and the only general rule, covering the place of prosecution, including the place of indicting. It was not intended to inject a number of statutes, some of them clashing with each other, into Section 53, but to harmonize all of them by providing a single general rule on the subject that those various statutes dealt with.

Despite the *Biggerstaff* decision, the indictment at bar is made a nullity because of Section 53 and hence cannot base a removal.

Grand Division IV.

There Is No Jurisdiction to Remove to the Southern Division of South Dakota, Because the Indictment Was Not Found in That Division, and Transfer to It Was Made on the Application of the Government, Though Section 53, Judicial Code, Makes No Provision for Transfer Except on Application of the Defendant.

The application to transfer was made by the Government (10-342; 77, 342). Section 53 has the only transfer provision. As said it permits transfer to be made on application by defendant.

Power to transfer and division jurisdiction depend upon express legislation. *Barrett*, 18 Sup. Ct. 327, 429, 169 U. S. 218; *Rosecrans*, 17 Sup. Ct. 304, 305, 165 U. S. 257; *Dwyer*, 170 Fed. 160, 164. Section 53 is such legislation.

Where the jurisdiction is statutory it must follow the statute and jurisdiction may not be had on consent actually made, or constructively implied by estoppel. *Gastonia v. Well*, 128 Fed. at 373.

Whatever power to transfer exists is given by Section 53, Judicial Code, and it has but one provision as to transfer. That provision is: The prosecution shall be had within the division where the offense was committed, "unless the court or judge upon the application of the defendant shall order the cause to be transferred for prosecution to another division of the district."

It is the theory of the law that there is no prejudice against the Government in any place in its territory. It follows that unless there be an express permission the

Government cannot have a transfer that amounts to a change in the place of trial. It follows in turn that, of course, it has no such right under a statute which while it permits a transfer, permits it to the defendant only. Of course, the grant of the right to order a transfer imposes all limitations on the grant. That is certainly so as to divisions created by statute, whatever may be true of court rule divisions made purely for convenience of place wherefrom to get jurors and witnesses. *Sutherland*, 214 Fed. at 324.

It follows that any use of the grant without regard to the limitations upon its use is as unauthorized as acting in the absence of grant would be.

While Section 53 permits transfer on stipulation in civil causes, in criminal causes the transfer must be invoked by the application of the defendant. *Rose*, *Juris.*, Sec. 282. Indeed the statute *says* the order must rest on such application. When transfer is ordered without that application, manifestly, the letter of the statute is disobeyed. Its spirit as well. For the provision is for the convenience of the defendant and in the nature of a method of giving effect to the Mandate of the Constitution that *defendant* may demand a speedy trial.

And when there is a transfer except on application of defendant, more than Section 53 is disobeyed. There is disregard, too, of the elementary law rule that jurisdiction of federal courts is presumed against, that their powers depend upon grant, and in that sense are courts of limited jurisdiction, and that when they act contrary to either the Constitution or the *laws* of the United States, they lack jurisdiction. And there is disregarded the equally elementary rule that power to transfer and division jurisdiction depend upon express legislation. *Barrett*, 18 Sup. Ct. at 327, 329, 169 U. S. 218; *Rosen-*

crans, 17 Sup. Ct. at 304, 305, 165 U. S. 257; *Dwyer*, 170 Fed. 160, 164. And Section 53 is such legislation.

The *Biggerstaff* case which is much pressed by the Government asserts that a certain Arkansas act is "included" in Section 53. We do not understand just what is meant by using the term "included," in this connection. But be that as it may, this act gives a named class of prisoners the right to move for a transfer. But as these prisoners were *defendants* the claimed "inclusion" of said act does not give the Government power to have a transfer, because said act gives the transfer only on application made by *defendants*.

It is the theory of the Government and of the *Biggerstaff* decision that when an indictment is returned in one division of a district there may be a transfer to any other division in that district. And whatever else may be claimed for Section 53, it makes no limitations as between divisions, so far as transfer is concerned. What it permits is a transfer "to another division of the district." Assume for the sake of argument that where a letter is mailed in one division and delivered in another then either division is the division of commission. But in South Dakota with its four divisions that still leaves one division in which the offense was not committed, on any theory. If there may be a transfer on motion of the Government and to any division in the district, then Section 53 makes it possible to send a case for trial on the motion of the Government to a division in which the offense was not committed. In other words, if the theory of the Government is sound then the command of Section 53 that the prosecution, even if that means trial, shall be had within the division of commission might be nullified at any time on the motion of the Government.

It is debatable, to say the least, whether the court can,

with the statute silent, order a change of place of trial on motion of the prosecution. 12 Cyc. 242, 243; *Sutherland*, 214 Fed. at 323. But be that as it may, it has no power to make such order on such motion when the statute says it must be done, if at all, on application of the defendant. And lacking the power to do what here was done, it follows *habeas corpus* should have interfered with removal for trial at Sioux Falls. Any other view must overlook that the federal courts act without or beyond jurisdiction whenever they do in one way what the statute expressly commands to be done in another way. *Habeas corpus* lies to stop a removal where the demand is based on an act without jurisdiction. Jurisdiction is lacking when the act done is in violation of a law of the United States. And, of course, Section 53 of the Judicial Code is such a law.

The only thing besides the application for and the order of transfer shown by the record is the immaterial recital that the Government presented the application in open court, in presence of defendant Sawyer "and their attorneys."

It makes no difference if the application was made in the presence of Sawyer or anyone else. It is not a question of remaining silent when the Government makes an application, but a question of whether there is any authority to do anything in Sioux Falls on a transfer made on the application of the District Attorney, where the statute provides for no transfer except on the application of the defendant. Sitting by when the Government makes an application is not the making of an application by the *defendant*.

So far as the point in consideration is concerned it is immaterial whether the Government or the petitioner is

right as to where indictment must be returned. If, there was no authority to indict in the Deadwood division, then there is no jurisdiction because of that fact. If return of indictment there is authorized, then a transfer to the Sioux Falls division is without jurisdiction, because the statute does not authorize such transfer on the application of the Government.

In any view then, the action below was erroneous. In no view was there a right to remove to Sioux Falls.

It is not amiss to add some statements that are relevant even though they do not bear directly on the main point of this division. Whatever is said in *Barrett's* case, 169 U. S. 218, 18 Sup. Ct. at 327, and *Rosencrans'* case, 165 U. S. 257, 17 Sup. Ct. at 304, 305, to the effect that the court has a discretion to order some transfers, of course, applies only to the statute law existing at the time of decision. Section 53 was at that time not yet enacted. The *Rosencrans* case is illustrative. It decides that *in the absence of express prohibition of such transfer as was made*, a transfer is sufficiently in discretion so that complaint of it may not be first made on appeal.

Grand Division V.

The indictment states no fact to support the conclusion that the alleged mailing of the letters was the joint act of the three defendants; nor any fact to support the conclusion that the letters were mailed in execution or attempted execution of the alleged scheme—and it shows affirmatively that none of these letters were written in aid of the said scheme. (See 39-46.)

All the indictment at bar has in addition to setting forth the letters is:

“Defendants so having devised * * * the aforesaid scheme to defraud, did * * * in and for executing said scheme and artifice, and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice, and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail,” etc. (22-342)

Each of the fourteen counts of the indictment concludes with this paragraph:

“That at the time of the placing and causing to be placed the said letter in the Postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice.” (342, pp. 23, 25, 27, 29, 31, 32, 33, 35, 36, 37, 38, 39, 41.)

The indictment states no fact to support its naked conclusion that “defendants deposited and stamped and caused to be delivered, etc.” It should have set forth some fact showing joint action, and it does not. Assuming for the sake of argument that causing delivery by mailing a letter can be a joint act (and it was significantly hinted in the Stewart case (C. C. A.), 119 Fed. at 95, that the deposit of a letter might not be a joint offense) yet, as said, no facts exhibited show a joint act. The letters signed and ex-

hibited, assuming they are truly set forth, have no joint signatures; nothing in them shows them to be a joint production; nothing is set forth to show joint action in causing their delivery. There is nothing but the conclusion that "said defendants * * * did cause to be delivered by mail" (a described letter). There is no charge of conspiracy, and therefore no attempt to bind any defendant by the acts of any of the others, as by a partnership in a criminal enterprise.

Such charge of joint action cannot be permitted to take the place of a conspiracy count. It would enable the Government to charge one defendant with the acts of each of the others and yet escape what must be proved if conspiracy were charged, to wit, to prove the additional element, that it was part of the scheme to promote it by the use of the mails. One cannot imagine why there should ever be a conspiracy count, as there nearly always is, if by charging joint action as is here done the benefits of the conspiracy count may be had without assuming the burden of charging the conspiracy.

As is shown in several other places in this argument no material fact can be efficiently stated by way of naked conclusion. (See 39-46.)

Part 5-a.

EVEN AS THE ALLEGED JOINT ACTION MAY NOT BE STATED BY WAY OF CONCLUSION ONLY, NEITHER WILL SUCH CONCLUSION SUFFICE TO CHARGE EFFICIENTLY THAT THE LETTERS WERE MAILED IN AID OF THE ALLEGED SCHEME (WHICH MAILING IS THE GIST OF THE OFFENSE).

As said, the effect, or, rather the lack of effect, of naked conclusions is elsewhere fully dealt with. At this point we submit the case law that deals specifically with conclusions directed to the charge of mailing letters in execution or attempted execution of the alleged scheme.

Part 5-b.

THE MAILING IN EXECUTION OR ATTEMPTED EXECUTION OF THE SCHEME BEING THE VERY GIST OF THE OFFENSE, THAT ESSENCE OF THE OFFENSE MAY NOT BE CHARGED, AS IS DONE HERE, BY ASSERTING SUCH MAILING BY MEANS OF A NAKED CONCLUSION, WHICH RUNS COUNTER TO THE LETTERS EXHIBITED—AND AN INDICTMENT SO CHARGING WILL NOT BASE REMOVAL.

We show elsewhere how ineffective naked conclusions are. We now add law on that point addressed specifically to conclusions as to the execution of a scheme.

The charge is that mailing was done in and for the purpose of executing or attempting to execute the alleged scheme (22-342) and that, when mailing, defendants knew that what was mailed was mailed for that purpose (23-342).

Not the scheme, but a mailing in its aid, constitutes the violation of Section 215.

The *Olsen* case (C. C. A.), 287 Fed., at 89, construes Section 215, as amended. It follows the *Lemon* case (C. C. A.), 164 Fed. at 957, and holds that the "mailing" in execution or attempted execution of the scheme, "is the gist of the offense denounced by the statute, and that it is that act and it alone that confers jurisdiction upon the courts of the United States to punish authors of fraudulent schemes."

In *Francis v. United States*, C. C. A. 152 Fed. at 156, it is said that it will be noted that in *In re Henry*, 123 U. S. 373, 8 Sup. Ct. 142, followed *In re De Bara*, 179 U. S. 320, 21 Sup. Ct. 112, it was held:

"The act (Section 5480) forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or taking out of such a letter or packet from the post office in furtherance of such a scheme."

That is also ruled in *Badders*, 240 U. S. 391, as to Sec. 215 as amended.

In the case of *In re Henry*, 123 U. S. 373, 8 Sup. Ct., at 143, it is declared the district judge well said that:

"The act forbids, not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office, in furtherance of such a scheme." To like effect is *Horn* 182, Fed. 727.

In *Marrin v. United States*, 167 Fed. 955, it is ruled:

By Section 5480, by which the use of the mails in a scheme to defraud is made a crime, it is the depositing in or the taking out of a letter, pursuant to such scheme, that is the offense; or, in other words, it is not the scheme, but the acts done under it, that are the concern of the law. *In re Henry*, 123 U. S. 373; *In re De Bara*, 179 U. S. 320; *Francis v. United States*, 152 Fed. 155 (C. C. A.)

The gist of the offense is the criminal use of the mails of the United States.

Horman (C. C. A.), 116 Fed. 351, citing *Jones*, 10 Fed. 469.

And the question whether an offense against the laws of the United States is charged goes to jurisdiction. If no such an offense be charged, then all jurisdiction to commit defendant for removal is at an end (*Tinsley*, 205 U. S. 20, 27 Sup. Ct. 430; *Morse*, 287 Fed. at 910).

One concrete application is that *habeas corpus* will lie if the indictment fails to charge an offense under the laws of the United States.

Ex parte Hyde, 194 Fed. at 211.

So, Federal law does not prohibit the devising of fraudulent schemes. It takes hold only if in execution or attempted execution of such scheme the post office establishment is used. That being the essence of the violation of 215 Penal Code, the accusation that the

mail was used for such purpose cannot be stated by way of naked conclusion. Time and again have the courts considered whether the letters involved were or were not intended to be an aid or attempted aid to such scheme. If a naked conclusion that they were, overcomes the letters themselves there was no occasion for such consideration. (See *Stokes*, 157 U. S. 187, 15 Sup. Ct. at 619), and *Stewart* (C. C. A.), 119 Fed. at 95. If the nature of the letters be an immaterial consideration and the conclusion that they were a help or intended help for the scheme, suffices, there was no occasion for such holding as is found, say, in *Lemon* (C. C. A.), 164 Fed. 953, which rules:

"It is imperatively required that a letter mailed should be one claimed or designed to aid or assist in the execution or attempted execution of a scheme already devised."

If such naked allegations suffice there was no occasion to consider whether the conclusion was supported by the letter, or to declare, as was done in *Tillinghast* case, 225 Fed. at 233, 23, that they were not. If the naked conclusion suffices, it is hard to account for the universal practice of setting out the letters in support of the conclusion.

The most that the Government can claim is that the conclusion suffices if the letter does not negative the conclusion. It should not be claimed that the opinion of the pleader is to prevail where the letters show on their face that they could not be and were not intended to be an execution or attempted execution of the scheme. A very clear statement on the point may be found in *U. S. v. Ryan*, 123 Fed. at 636:

"Do the letters set out in the indictment, or any of them, show that they were in any way necessary or intended by the parties as a part necessary to carry out the fraudulent scheme contemplated by them?"

In that case the conclusion was, that "a mere glance at the contents of the letters show they were not part of the fraudulent scheme."

Part 5-c.

AS TO HOW STRICTLY THE GIST OF THE OFFENSE—THE MAILING IN AID OF THE SCHEME—MUST BE PLEADED.

It is an established rule that the execution or attempted execution must be charged with more particularity than is required as to the scheme; that the scheme "need not be pleaded with all the certainty as to time, place and circumstances requisite in charging the gist of the offense, the mailing of the letter in execution or attempted execution of the same" (of the scheme). *Gardner* (C. C. A.), 225 Fed. 578, citing *Colburn*, 223 Fed. at 590; *Gould*, 209 Fed. 730; *Brooks*, 146 Fed. 223; *Lemon*, 164 Fed. at 953, and *Horn*, 182 Fed. 721. The *Gould* case, 209 Fed. 730, holds precisely what the *Gardner* case does. The *Gould* case is approved in *Mounday* (C. C. A.), 225 Fed. at 966, and the *Mounday* case cites the *Brooks* case, 146 Fed. 223, the *Lemon* case, 164 Fed. 953, and the case of *Hyde*, 198 Fed. 610. And the *Spear* case, 288 Fed. 487, is to the effect of the *Gardner* case.

As seen, it is settled law that the mailing and not the scheme is the gist of the offense, and numerous decisions rule that whatsoever is the gist must be pleaded. As is said in the *Gardner* case, "with all certainty as to time, place and circumstances." *Bowers*, 244 Fed. 643; *Horman*, 240 Fed. 196; *Ryan*, 123 Fed. 636; *Long*, 68 Fed. 348.

The essential fact that the letters are such as that they may in reason constitute an execution of or an attempt to execute the scheme devised may not be es-

tablished by charging by way of conclusion that the letters were of that character. Whether they are, is matter of judicial investigation—an investigation whether the acts charged to be in execution of the scheme are that. *Stewart v. U. S.* (C. C. A.), 119 Fed. at 95.

In the *Cruikshank* case, 92 U. S., at 558, it is held that “one object of the indictment is to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated; not conclusions of law alone.” And these facts must be stated:

“So clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the laws, the facts there stated are sufficient to support a conviction.” *United States v. Hess*, 124 U. S. 483, 486, 487; *United States v. Post* (D. C.), 113 Fed. 852.

We find the same doctrine in a decision wherein removal was denied on *habeas corpus*, to wit, the case of *Tillinghast*, 225 Fed. 226.

The *Tillinghast* case deals with the question whether the acts in execution set forth may be said to be relevant to the conspiracy charged. The conspiracy was one to deprive the United States of sums of money, and the decision declares that no innocent step toward the creation of a new right in the United States to receive sums of money can be regarded as an act “to effect the object of depriving the United States of that money”—all of which spells that the court will investigate whether what is alleged to be in execution of a scheme is in fact such execution or attempt to execute. It is declared that the alleged plot must be looked to “in determining whether an alleged overt act is in fact an act to effect”—that the acts set forth do not directly or by inference show that they were intended to effect the plot—and further “cannot support a finding of prob-

able cause"; that "certainly it should be made to appear by the allegations of the indictment that there was a connection between the act done and the planning" (230); that the constitutional right to be tried in a place where the offense is committed cannot be impaired "upon any arbitrary statement that an act was done in pursuance of the plan and to effect the object of that plan when nothing in the nature of the plan or act done or object alleged shows to the court the relevancy of the act to the preconceived plan or the object of that plan" (232); that an allegation of overt acts is "entirely too uncertain where it does not enable the court to attribute it to a relevant conspiracy; that it is for the court to say whether the object alleged is effective to accomplish that object" (229), and that "the object defined as the purpose of a criminal plot * * * must be looked to in determining whether the alleged overt act is in fact an act to effect it" (230).

Again—

"But surely, if an indictment may be so loosely framed that the Court is unable to see that the act alleged to be done was in the relation of cause and effect with a thing planned, then it may be called upon to base a fiction that one who is really absent is legally present upon an isolated fact having no apparent tendency to effect the object of the conspiracy, upon faith in the pleader's bare allegation that it has such connection. This is not permissible for the question of relevancy is to be determined by the Court upon facts alleged, and not by the pleader's opinion." (232).

Further—

Whether or not it is possible to frame any indictment setting forth an extensive plan which could make the purchase of oil and like commodities used in oleomargarine an overt act or step towards defrauding, yet under well settled rules of law an indictment charging a plan to defraud the United States will not warrant a removal where "it contains no averment of anything

which can amount to an overt act done in the district where the indictment is returned, to effect the purpose defined by the indictment" (at 233, 234).

The court recognizes that there seems to be considerable authority for the assertion that it need not appear upon the face of the indictment in what manner the act described would tend to effect the object of the conspiracy, and to the effect that if any act is set forth and is alleged by the pleader to have been done pursuant to the conspiracy or to effect its object, this is enough, though there is no apparent connection between the overt act and the object. But it holds that since the decisions in *Hyde's* case and in *Brown v. Elliott*, 225 U. S. 392, the line of decisions referred to above and cases that have followed it are of doubtful authority. And it is said:

"This seems unsound in principle, for relevancy is for the Court and not for the pleader. If an act must be qualified by circumstances to make it relevant, it should be pleaded, not simpliciter, but with these circumstances which make it relevant" (230).

Part 5-d.

ASSUMING FOR THE SAKE OF PRESENT ARGUMENT THAT JOINT ACTION IS EFFECTIVELY CHARGED, WE NEXT SUBMIT THAT EVEN IF IT BE ASSUMED THAT EACH DEFENDANT IS RESPONSIBLE FOR THE LETTERS ALLEGED TO HAVE BEEN MAILED BY EITHER OF THE OTHERS, THERE IS NOTHING IN ANY OF THE LETTERS THAT OFFENDS THE STATUTE.

Each of them shows affirmatively that it deals with a finished transaction; that if mailed, it was when the addressee had already been defrauded, if defrauded at all. In other words, the mailing of the letters does not offend the statute, because a letter that deals with a completed transaction is necessarily not an attempt to execute or

the execution of a scheme. There can not well be an execution or attempted execution of what has already been executed.

In the *Stewart* case (C. C. A.), 119 Fed. at 91, 92, 95, the scheme was to cheat those who would bid on a "fake foot race." Defendant proposed to Davis that the latter make a bet with Ellis and told Davis that Boatright would furnish the money, allowing Davis commission on the winnings; then defendant introduced Davis to Boatright and to one Stewart; the latter represented to Davis that Boatright was a responsible business man—thereupon Davis made a bet of \$4,400 that one Gillett could beat one Stansbury. Boatright gave Davis the money for this bet and Boatright was made stake holder, and in that capacity at once received the money back from Davis. Next, Boatright represented to Davis that the former had no more money to wager but stated to Davis that if the latter would lend \$5,000, Boatright would wager that further sum upon the result of the proposed race. Davis agreed to make this loan on condition that it should be refunded and drew a sight draft for \$5,000 making the draft payable to Stewart, who sent the draft by mail to the drawee bank and requested the forwarding of the proceeds. After this letter was mailed Boatright made a pretended additional bet in \$5,000 with the money he had borrowed from Davis. The day appointed for the race arrived before Boatright had refunded this loan. Gillett fell down in this race and claimed to have sustained some injuries. Thereupon it was agreed the race should be run over as soon as Gillett recovered from his pretended injury—and the agreement to so postpone the race was made to keep Davis from stopping payment of the draft he had drawn.

It is ruled to be of controlling importance that the letter involved does not seem to have been written to

accomplish the scheme to defraud, and that being so, it can hardly be said to have been deposited in the mail to make effective the alleged scheme, for in that it was written long after Davis had been induced to make a bet and had sustained all the loss he could possibly sustain by reason of the alleged fraudulent scheme. And that the letter is as matter of law neither the execution of or an attempt to execute the scheme alleged.

Another observation to be made concerning the indictment is this: That while the fraudulent scheme, as described, was one whereby the mails were to be employed to induce persons to come to Webb City, to be afterwards defrauded, yet the letter which was deposited in the mails by Gillett, on which the third count is founded, does not seem to have been written to accomplish any such purpose, and for that reason it can hardly be said to have been deposited in the mail in execution of such a scheme as the indictment describes. It was written, as it seems, long after Davis had been induced to go to Webb City and after he had wagered his money and sustained all the loss that he could possibly sustain by the reason of the alleged fraudulent scheme.

Stewart, 119 Fed. at 95, 96.

In *Trent v. United States* (C. C. A.), 228 Fed. 650, the court dealt with a contention that the letter showed on its face the scheme had been fully executed and could not have been in aid of a scheme still afoot. It recognizes that if that were so, the case would be ruled by the *Stewart case*, 119 Federal, 89, but it differentiates and declares that the letter in the *Trent case* shows quite the reverse of what is claimed, and said:

"It was written to one of the accused by a local agent intrusted with the delivery of abstracts and deeds and the collection of the price from the purchasers, contained a remittance on account of collections, mentioned the number of deeds not delivered, asked for a plat of the city, so-called, showing the railroad, etc."

We now proceed to apply to the letters the tests sanctioned by the law.

The one in count 2 is addressed to one Will and signed Midland Packing Co., Fred C. Sawyer, President. It encloses certificates for stock already bought. This is true of one in count 10 addressed to Hartman, and signed the same way. These two letters are as follows:

"Enclose described stock certificate 50 shares common stock 'which you purchased from us' and asks return of the receipt for same in enclosed stamped envelope. The rest is that as Will no doubt knows the plant is now in operation and if he is in the city at any time 'we' trust we may have the pleasure of a visit from him and an opportunity of going over the entire project." (342-25.)

"Encloses stock certificate 'representing the stock which you recently purchased, together with receipt for same which return in stamped envelope.' Glad indeed to number him among their stockholders and appreciate the assistance he has rendered to their representative. Pleased to advise the progress of the plant at this time is very gratifying to the officers and trusts that if addressee is in Sioux City "they may have pleasure of having a visit with him and going over the entire project." (342-36.)

The one in count 4 and the one in count 5 is addressed "to all stockholders." One is signed Midland Packing Co., Fred C. Sawyer President. The other Midland Packing Co. They are respectively as follows:

"Encloses an editorial page and speaks approvingly of its saneness and candor; points out that every stockholder is a partner and should have the solicitude and interest of a partner and if it is felt matters need adjustment to come to the stockholders meeting that will be held in the near future and make his trouble known, and if suspicions have arisen from malicious rumors, to make investigation at that time, and as a business proposition and in fairness to the stockholders in the company should preserve rather than destroy that which is his." (342-28, 29.)

"Encloses pamphlet of by-laws; says what informa-

tion the pamphlet gives, also pamphlet issued by the Sioux City Chamber of Commerce which contains information and statistics about the different industries in and around Sioux City. Points out that the enclosures indicate what the business men of that city think about the Company 'in which you have invested your money' and that they are able to send one pamphlet to each stockholder. The pamphlet should be read very carefully because it has valuable information regarding 'the gigantic house in which you are financially interested and its success depends greatly upon the cooperation of its stockholders.' " (342-30.)

The one in count 3 is addressed to Groesbeck, and is signed Midland Packing Co., C. H. Burlingame, Treasurer. The one in count 6 to Shanard, and signed Midland Packing Co., Fred C. Sawyer, President. The one in count 9 is addressed to Anker, and is signed as is the one in count 6. The one in count 14 is addressed to Rowley and is signed Midland Packing Company, Fred C. Sawyer, President.

Each of these four letters deal with dividends, and three of them enclose checks for a dividend, and are respectively as follows:

"Letter of Groesbeck of recent date in which he inquires as to his dividend has been referred to the writer for answer: that your stock has now been issued for a year is evidence of your early faith in the institution and belief that after operations have commenced substantial profits might be made on the investment but because of the vast amount of money required in the operation of the plant, which is now enjoying a prosperous trade and the fact that all their money was needed for that purpose has caused the Board to pass a resolution. What is said of the resolution is in effect that further dividends be accrued up to July 1, 1920, and shall then become due and payable. The writer says the purpose is to enable the corporation to use all its funds in operation. Feels sure Groesbeck would agree it would be unwise to borrow money for operation when using their own money would bring greater returns and he trusts Groesbeck will agree that this is a wise deci-

sion; he asks his patience and judgment of the work being done 'because we feel confident that the prospects based upon the splendid business we have been enjoying since operation, will fully justify this conclusion.''' (342, 26-27.)

"Your 10 shares of preferred stock purchased on June 21, 1918, entitles you to 7% guaranteed dividend due and payable on June 21, 1919; pleased to advise that they have been fortunate enough to make sufficient legitimate profits to be able to pay this dividend at this time and encloses check for \$70.00 and asks that receipt be acknowledged. It adds that addressee was among first purchasers of stock of the project. That despite war and labor conditions they hope to have the plant complete and running within less than a year's time from the commencement of actual building. They think this is an unprecedented accomplishment; they feel that the structure now nearly completed will be one of the finest packing houses in the west. Hope is expressed that Shanard will call upon them when in the city and look over the plant and if he will do this he will feel that the investment is one which has been justified and that in the future he may look for substantial returns upon his investment." (342-31.)

"Like the dividend letter to Shanard except that the dividend check is \$175.00." (342-34, 35.)

"Your 20 shares of preferred stock have earned the Shanard dividend—the only difference is the dividend check is \$140.00." (342-40, 41.)

Coming to the ones alleged to have been written by defendant Salinger, and to have been signed by him as vice president and general counsel, three gave assurances that a contract of some kind made by the addressee with Colby and Spellings would be carried out. Nothing whatever is said as to who either Colby or Spelling are, or that they are in any way connected with the Midland Packing Co. In two of them, nothing is said about what the contract referred to is about, and in one the most that is done is to state by strong implication that the contract referred to in that letter is

an agreement that the note of addressee will not be sold or negotiated or used as collateral pending its life. These letters are addressed respectively to Christianson, P. C. Peterson and to Peterson and Alfred Christianson, and each of them is alleged to be signed, Midland Packing Co. B. I. Salinger Vice President and General Counsel. The said three letters are counts 7, 8 and 13, and are respectively as follows:

"Referring to your sale of October 22, Spellings & Colby have advised us of this sale and of their promises made to you in connection with its resale and this is to advise you the company has been informed and thoroughly understands their promises to you and that your note will not be sold or negotiated or used as collateral pending its life." (342-32, 33.)

"Colby and Spellings have advised us of their arrangement with you which we thoroughly understand. You may be assured that the contract will be carried out."

"Colby has called our attention to the contract he has entered into with you and this letter is written to advise you that the company is fully aware of the contract entered into and of the conditions of Mr. Colby's agreement with you." (39-342.)

The letter in count 11 has the same signature and is addressed to Kimball and it is this:

"Thanks for his prompt attention and renewal to his note; acknowledges receipt of check for \$225.00 interest; encloses cancelled note and assures of sincere appreciation of the confidence Kimball has shown in the project. The plant is practically ready for operation and 'we' feel that the future of the business is assured." (342-37.)

The letter in count 12 has the like signature, is addressed to Jensen and is this:

"Your note for \$1,000 will be due January 15th, with interest at 6% from date. If you will advise to what bank you wish your note sent for collection same will be promptly sent." (342-38.)

The one in count 1. Dated March 31, 1920, to Martin Christianson, Viborg, South Dakota, is alleged to be signed Midland Packing Company, B. I. Salinger, Jr., Vice President.

"Acknowledges a letter from addressee of March 30; is very much pleased he wrote because the rumors that reached Christianson are entirely false. The Company is not in the hands of a receiver, has not been and there is no possibility of its so being; was based upon 'our' judgment that no profits could be made by so doing. For the rest the effect is that the business cannot be run to suit those who have nothing invested and that 'we' will be compelled to conduct the business along lines which are conceived will make the most profit to stockholders and not to conduct the business when there are no profits to be gained. The concluding paragraph is that the writer will be glad to see Christianson at any time at the plant and go over the matter fully with him. (23-342)

We respectfully submit that with the exception of the letters written about Colby and Spellings and the one to Jensen, each letter shows affirmatively that it deals with something that had already been executed.

As to the Jensen letter (342-38) it is in itself utterly innocuous and merely gives an option to have a note sent for collection if the payer desires that, and manifestly it, too, is addressed to one who had already bought his stock. The same appears from the letter to Kimball (342-37). As said before, the Colby and Spellings letters do not appear to have any relation whatever to a transaction by the Midland Packing Co.—at any rate, nothing about them as much as indicates that they were written to help the alleged scheme. Whatever indication they do have is that the addressee, if Midland stock is being referred to, had already bought his stock when the letter was mailed.

In not one of them is there any suggestion that the

addressee should buy more stock, or should do anything whatever to induce anyone to buy stock.

In *U. S. v. Ryan*, 123 Fed. 636, it is said:

“Do the letters set out in the indictment or any of them show that they were in any way necessary or intended by the parties as a part necessary to carry out the fraudulent scheme contemplated by them? A mere glance at the contents of the letters show they were not part of the fraudulent scheme.”

It is unnecessary to dwell upon what the law is where the conclusion that they were mailed in execution of the scheme is not negatived—where, for all that the letters show, they may have been mailed with intent to aid the scheme.

We submit that in the present case we have letters which affirmatively show that the conclusion of the pleader is unsound. When it is all said, the *Tillinghast* case but rules that where the scheme charged is to obtain money, say, by false pretences no purpose to effectuate such a scheme is shown by a letter, say, that George Washington was the father of his country. Carrying it a step beyond, a letter could not have been thought to effectuate such a scheme where it appears on its face that, as here, it was addressed to those who had already been defrauded, if ever defrauded—letters to those who have already bought stock and in which not so much as a suggestion was made that they should buy any more stock or do anything whatever to induce some other person to buy stock. If fraud there was, these letters were written after the fraud had been fully accomplished—wherefore it must be held as a matter of law that they were not an execution or attempted execution of the alleged scheme to obtain money for stocks by false representations, promises, etc. (13-342)

Grand Division VI.

No Offense Is Charged Because There Is No Allegation as to the Value of the Stock Sold and Hence Nothing Setting Forth an Intent to Defraud.

On the authority of *Miller v. U. S.* (C. C. A.) 174 Fed. 136-38, there is no violation of Section 215 where the indictment fails to charge that the shares sold in pursuance of the scheme were not worth what was got for them. Said decision is based upon the elementary propositions that an intent to defraud is a vital element; that the indictment to charge an offense must set forth the necessary elements of the offense, and that where it fails to show that what was sold was worth less than was paid for it no intent to defraud is exhibited. Ordinarily, at least, it is true that one who obtains full value has not been defrauded, and whoever gives him full value did not intend to defraud him.

True, there are decisions which rightly hold it is immaterial that what was obtained was worth what was paid for it; but they do not affect the present case. They deal with misrepresentations as to the kind and nature of the thing sold, or with cases where one was induced to invest by misrepresentation as to what the thing invested in had cost the seller. Of course, where it is represented to a buyer that he is getting a Steinway piano, and he wants no other piano, then if what is delivered turns out to be a piano of different make, it is no answer that the piano actually sold was worth what was paid for it. The buyer had the right to refuse buying anything except the instrument he wanted; had the right not to buy even if something he did not want was worth what was charged for it. So of the other illustration. It is human nature to desire getting in on the ground floor.

Many a man will not buy if advised that the profit asked is in his opinion too great, even if the thing involved is worth the price asked. Therefore, in the eye of the law, there may be an intent to defraud where the cost price is misrepresented. In the illustration cases the fraud consists not in obtaining an improper price but in the fact that if there had been no misrepresentation no purchase would have been made.

Here, the charge is that false promises and representations induced the buying of stock and that so the purchaser was defrauded. It is not charged the buyer was told he was getting something other than Midland stock—and, in a word, no offense is charged because the indictment exhibits nothing to show fraud either intended or accomplished.

And, speaking to a case of mailing, in the *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 572, it is said to be the universal rule "that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective—no essential element of the crime can be omitted without destroying the whole pleading." The case of *Britton*, 108 U. S. 199, 2 Sup. Ct. 530, 531, holds an indictment insufficient because, so far as the facts pleaded show, essential elements of the offense are not pleaded so that for all that is pleaded nothing is exhibited, except an act that in itself might be lawful. To like effect is the case of *Pettibone*, 148 U. S. 197, 13 Sup. Ct. 542.

It is said in *Post v. U.* S. 113 Fed. at 854:

"The principle that in criminal pleading there must be direct, positive and affirmative allegations of every point necessary to be proven is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged."

The *Morse* case, 287 Fed. 913, cites with approval from *U. S. v. Dowling*, 278 Fed. 630:

"The indictment should set forth accurately every ingredient of which the offense is composed * * * and the test is whether the indictment contains every element of the offense."

The courts of the Cherokee Nation "can only try for crime of murder when the person murdered is an Indian. * * * This jurisdictional fact nowhere appears on the face of the papers submitted to the Governor. The affidavit fails to show that either Johnson or Morgan were Indians. It does recite that Johnson was sheriff of Sequoyah district. He might have been such sheriff under the laws of the Nation if he were a white man and had been adopted into the Nation; and this recital does not necessarily show that the courts of that country had jurisdiction to try Morgan for killing him. The requisition recites that Morgan is a citizen of the Cherokee Nation. That does not of necessity show him to be an Indian, because he may become a citizen and still not be an Indian. In order to give jurisdiction it must appear that both were Indians."

Ex parte Morgan, 20 Fed. at 308 (extradition).

Grand Division VII.

The indictment violates the provision of the Constitution which requires it to be in such form as reasonably to apprise the accused of what he is charged with, and what he must do to prepare for trial.

In every way, the indictment at bar is more open to criticism than the one that was condemned in *United States v. Stewart* (C. C. A.), 119 Fed. 90, 92, 94. Of the latter, the court said:

"It should be further observed, concerning the indictment as a whole, that it is needlessly long and involved, and that it contains many redundant and immaterial allegations, which defects, when taken together, render it difficult to construe, and almost unintelligible. If it be an offense under section 5480 (U. S. Comp. St.

1901, p. 3696) to use the mails to induce persons to come to a certain place for the purpose of defrauding them by tricks and artifices to be devised after their arrival, then the indictment now under consideration might and should have been made much shorter, more explicit, and more intelligible. We are of opinion that it lacks that certainty of averment which should be found in an indictment or information, and that for this reason, if for no other, it ought to be quashed on a motion to that effect."

That the stricture in the Stewart decision is warranted here is demonstrated by the merest glance at the indictment.

To begin with its vital allegations are naked conclusions. We show elsewhere, that such will not make a good indictment.

It is alleged that the scheme was devised about the month of November, 1917, the exact date being unknown; that it was a scheme and artifice,

"to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, from the Midland Packing Company, a corporation thereafter to be created.

Also from certain persons named and divers others whose names are unknown, the latter being thereafter denominated victims.

A scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises, from said corporation and said persons named by inducing by fraudulent representations, pretenses and promises, and by fraudulent artifices and devices "said victims, *as hereinafter more fully set forth*" so intended to be defrauded, to part with their money and property in the purchase of shares of stock in the said Midland Packing Company." (342)

Any attempt to make a complete analysis of the indictment would be of no value—when the analysis was finished it would still be no clearer than the indictment itself. That results from the fact that the indictment

so lacks coherence and clearness that a clear summation is impossible. For one thing, aside from exhibiting the fourteen letters, and in merely stating the scheme, it begins with a paragraph on the bottom of page 12 in No. 342 and ends with the first paragraph on page 42. It must suffice to say that time and again it makes the statement that it is setting the scheme forth "more particularly" by what is about to follow (13-342)—and nothing follows (14-342). It covers pages that precede with the statement that something was done "in fraud of the said corporation and victims," without statement of what was done. (16-342) It is filled with absolutely immaterial matters by stating things done that are in themselves innocent and undisputed, such as the amount of capitalization of the Midland Corporation and the nature and amount of the shares (13-342). It asserts an abortive attempt by an unauthorized agent to buy property for \$250,000, and after showing that it was abortive, charges, as a basis for charging fraud, that the same property was later bought for a much larger sum (13-342; 1415). In other words, nowhere in the indictment does it appear that the property was ever bought for the lesser sum. It recognizes over and again that there is a difference between the scheme and acts done in execution of the scheme; but with allegations as to the scheme it blends inextricably allegations of acts claimed to have been done in execution. We repeat that it would be idle for us to expand this. We make the statement that the indictment is well-nigh unintelligible, that it is utterly and needlessly lengthy, confused and prolix, and that the effect is to deny the constitutional right to be informed of the accusation made in such manner as that one may prepare himself to meet it at the trial. Nothing we could add would be helpful. The court must analyze the

indictment for itself. No exhaustive analysis on our part would help, because no clear analysis can be made of a thing that is so worded as to be impossible of clear summation or analysis.

It is said in the *Hess* case, 124 U. S. 483, 8 Sup. Ct. at 572, speaking to an indictment for mailing and with a preface that all material facts and circumstances must be stated and that no essential element of the crime can be omitted, that the statement

"must be made directly, and not inferentially or by way of recital; * * * as a foundation for the charge a scheme or artifice to defraud must be stated which the accused either devised or caused to be devised, with all such particulars as are essential to constitute the scheme or artifice and to acquaint him with what he must meet at the trial."

Chief Justice Marshall, condemning straining for constructive presence, inquired in the case of *Burr*, 4, *Cranch* at 490: "For what purpose are those provisions in the Constitution * * * which ordain that the accused shall be informed of the nature and cause of the accusation." And he insisted that those provisions were substantial guaranties. See *Tillinghast*, 225 Fed. 232 (which applies this in a removal case). In 4, *Cranch*, at 499 (*Burr* case), the court said:

"The Eighth Amendment to the Constitution has been pressed with great force and it is impossible not to feel its application to this point. The accused cannot be truly said to be informed of 'the nature and cause of the accusation' unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defense."

Grand Division VIII.

Not only is the indictment in such form as that it deprives the defendant of his constitutional right to be clearly advised of the nature of the charge against him, but according to Stewart's case (C. C. A.) 119 Fed. at 96, it is in such condition as that it should be quashed on motion. (See in 705.)

We do not overlook the line of decisions to the effect that the writ will be discharged because such flaws as the indictment exhibits must be raised in the trial court by demurrer, motion to quash, or the like. We do not challenge these pronouncements except to say that they are irrelevant. It is undeniable that such direct attacks must be made in the trial court. It alone can eliminate the indictment by sustaining demurrer or motion. But that has nothing to do with the functions of the authorities who are called upon to act judicially in determining *in limine* whether an accused shall be removed. These authorities do not pretend that they can annul the indictment. But that is no reason for saying that they shall find probable cause to exist when their judicial inquiry convinces them that none does exist. In other words, when they hold there should be no removal because the indictment is demurrable or quashable, they merely hold that there is no justification for removal. That they cannot sustain demurrer or a motion to quash, affords no reason why they should send accused to a distant state when they believe that the hardship resulting will accomplish nothing—when they believe removal will be idle because they believe not only that there can be no conviction but that the indictment is in such condition that there will never be a trial. When they refuse to remove, the indictment still remains, and if ac-

cused should enter the district wherein the indictment is returned he can be proceeded against thereunder as if there never had been a declination to remove him. The question is not who may annul an indictment, but whether one who believes, for any good reason, that removal would be idle, should none the less, subject to the hardship of being removed—compel accused to attack an indictment which the removal authorities believe is vulnerable to such attack.

What would there be left of the requirement that the inquiry on removal should be judicial if those called upon to order removal must do so, although they believe either that there can be no conviction, or, more than that, that there never can be a trial on the indictment which is the basis of the removal sought. Justice Thayer in the *Stewart* case, 119 Fed., declares that the indictment there involved was such that it should be quashed on motion. Would he be acting judicially if he made an order of removal when he so regarded the indictment? If that were his duty his judicial function would consist in ordering removal when he was convinced that no probable cause existed, *i. e.*, that there never could be a trial.

In a word, sustaining an attack upon the indictment is one thing; refusing removal because it is believed that attack upon the indictment must be successful is quite another. Removal should not be ordered in a judicial proceeding when it is believed from the hearing that it will be idle to remove.

"The court can require that it be satisfied before" ordering his transfer to a different state for trial that there was evidence on which a jury might convict him in that state.—*Fowkes* (C. C. A.), 53 Fed. 16.

We do not agree with the insistence by the district attorney, on behalf of the United States, that if the indictment is insufficient it must be met by a motion to quash or some other appropriate proceeding in the court

in which it is pending, and whose action would be subject to review.—*In re Greene*, 52 Fed. 106.

There is good cause for holding that this power should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or on *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses committed perhaps in some place he had never visited, he were removable to a district thousands of miles from his home, to answer to an indictment fatally defective, on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending.—*In re Terrell*, 51 Fed. 214.

In the case of *Dana*, 68 Fed. at 897, it is pointed out that an indictment often if not usually does not state matters as they were proved before the grand jury, but pleads them according to legal effect,

"i. e., as the district attorney may understand their legal effect. Legal inferences are often stated as facts; facts and law are indistinguishably blended * * * An indictment that appears on its face to be of this character cannot be deemed or treated as equivalent to a deposition or an affidavit of facts * * * and its form and contents forbid it to be so regarded. It must be taken by its statements altogether; and if taken as a whole it is contradictory on material points, it would become useless as an affidavit of facts, however well pleaded, and such indictment is therefore insufficient as a foundation for removal proceedings."

All of which spells that on the question whether removal should be ordered, it is a vital consideration that the magistrate acting in the removal proceedings believes it is idle to remove because of the condition of the indictment.

Be all this as it may, it is horn-book law that at the most the indictment is but *prima facie* evidence

whereon to order a removal. And it is thoroughly settled that while, by grace, the pleading is admitted as evidence, it may not escape the tests applied to other testimony. See the case of *Dana*, ante.

"Although the indictment may be treated as an affidavit, it is nevertheless to be judged by the same rules as another affidavit, and given weight only according to the nature and character of its averments and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the defendant guilty."—*Greene*, 100 Fed. at 943.

In a decision approved in *In re Dana*, 68 Fed. at 890, it was said:

"The allegations of the date of the conspiracy," says Judge Lowell, "involve the indictment in contradictions, which, if they are errors, must be corrected by evidence, and none is offered. The indictment itself must stand or fall, by its own dates. * * * It is, therefore, worthless as evidence of a conspiracy, just as an affidavit would be which contained such inconsistencies."

Beyond the jurisdiction, it may, therefore, be received as any complaint on information and belief would be received, and its sufficiency should be judged by the same rules. The question of probable cause, the magistrate must himself determine from all the facts ascertained by him. The judgment of a foreign grand jury is not to be a substitute for his own. If the narrative of facts contained in the indictment is clear, consistent, and unambiguous in showing the commission of the offense charged, I think it may be regarded as equivalent to a deposition of facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it; and as such, sufficient evidence for the issue of the warrant of arrest, under section 1014, when other evidence of the facts is not conveniently attainable; and hence it is also sufficient for commitment, if examination is waived, or when the averments of the indictment are not contradicted.—*Dana*, 68 Fed. at 896.

So in any view it becomes material that the indictment is confused and needlessly prolix and filled with naked

conclusions, because if that be its condition it affords no evidence of probable cause. It is equally true that if it leaves out some essential element of the offense or is, say, wholly duplicitous, it will not base a removal, if for no other reason than that such being its condition it is not competent evidence of probable cause.

The whole question is summed up in the statement of the court in the case of *Terrell*, 51 Fed. at 213:

"There is good cause for holding that this power (refusing to remove) should be exercised liberally, whenever the judge before whom the questions are raised, on application for a warrant of removal, or an *habeas corpus*, is satisfied, from the face of the indictment, that were such indictment before him for trial, and demurred to, he would quash it."

And despite indictment the judge may go into the whole case, if necessary, to enable him to determine whether the party should be removed to a distant part of the country.—*In re Wolf*, 27 Fed. 606, 608; *In re Dana*, 68 Fed. at 891.

Part 8-1.

THERE SHOULD BE NO REMOVAL ON AN INDICTMENT WHOLLY DUPLICITOUS.

From what has just been said it follows that whenever the condition of the indictment which is the only witness is such as that it is not a competent witness, removal must be denied. This would be true of an indictment which was wholly duplicitous. Or of one that failed to charge an offense by failing to state some essential ingredient of the offense. When the indictment is in that state the authorities acting in removal may presume that if removal were ordered defendant could not be convicted, because he could make an attack upon the indictment that would prevent him from being tried—which,

of course, would prevent his being convicted. In this aspect the essential point is that no removal should be ordered to accomplish an idle thing—that no one should submit to expense and burden of a trial for the chance of reversing conviction upon a direct appeal, if the authorities acting in the removal proceedings believe that under the law he should never be put on trial.

We have in another place argued the proposition that depositing a letter and causing it to be delivered are not two offenses; that, if they are assumed to be, for the purpose of giving South Dakota jurisdiction—then they are two offenses for all purposes; and hence the indictment would be duplicitous—and that it should not be presumed *for the pleader* that he intended to draw a duplicitous indictment. We now reach the point where we say that if the claim of two offenses be persisted in then this indictment *is* duplicitous, because both of these offenses, or rather asserted offenses, are charged in each and every count of the indictment. Following what was said before, we submit that if the indictment is not duplicitous, if mailing and causing to be delivered does not constitute two offenses, then the only offense is the mailing, and that was done in Iowa. But if on the other hand these two things do constitute distinct offenses, then, the indictment being duplicitous, one should not be removed for the purpose of being relieved from trial because of successful assertion in the trial court that the indictment is duplicitous.

All of which is respectfully submitted.

B. I. SALINGER,
Attorney for Appellant.

**SIXTH AMENDMENT TO THE CONSTITUTION OF THE
UNITED STATES.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sec. 3, Article 3, Constitution of the United States.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

Section 53, Judicial Code.

When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All means and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All *prosecutions* for crimes or offenses *shall be had within the division of such districts where the same were committed*, unless the court, or the judge thereof, *upon the application of the defendant*, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded within said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall

be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division. (36 Stat. L. 1101.)

Sec. 215 Crim. Code, page 12796.

Using the mails to promote frauds; counterfeit money punishment for.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thou-

sand dollars, or imprisoned not more than five years, or both. R. S. Sec. 5480, as amended Act March 2, 1889, C. 303, Sec. 1, 25 Stat. 873. Act March 4, 1909, C. 321, Sec. 215, 35 Stat. 1130.

Sec. 1674, Compiled Statutes, 1916. (R. S. Sec. 1014.)

Offenders against the United States, how arrested and removed for trial.

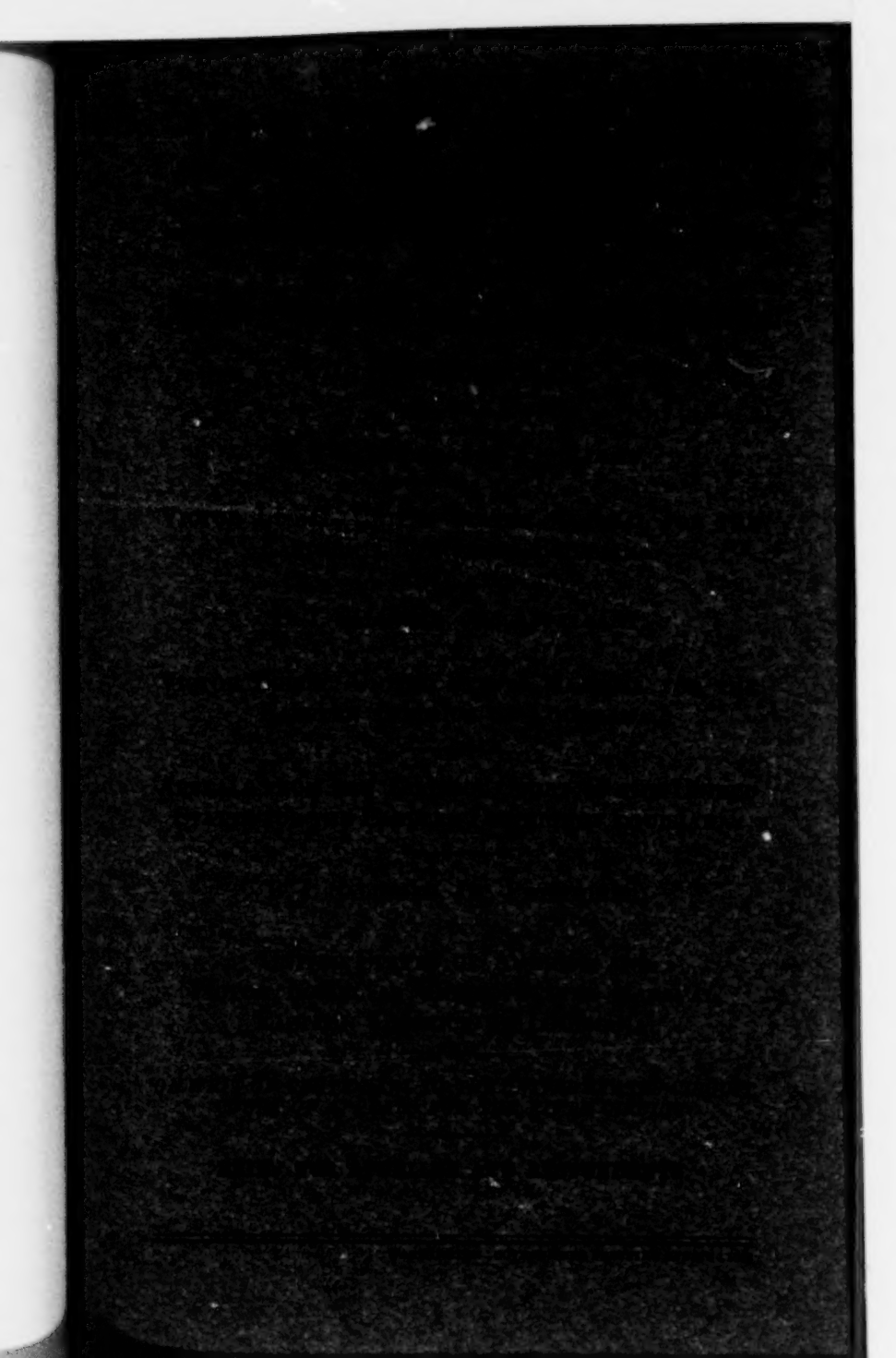
For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

Sec. 1682. (R. S. Sec. 1018.) Surrender of criminals by their bail.

Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneration of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

Sec. 1683. (R. S. Sec. 1019.) New bail to be given in certain cases.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.



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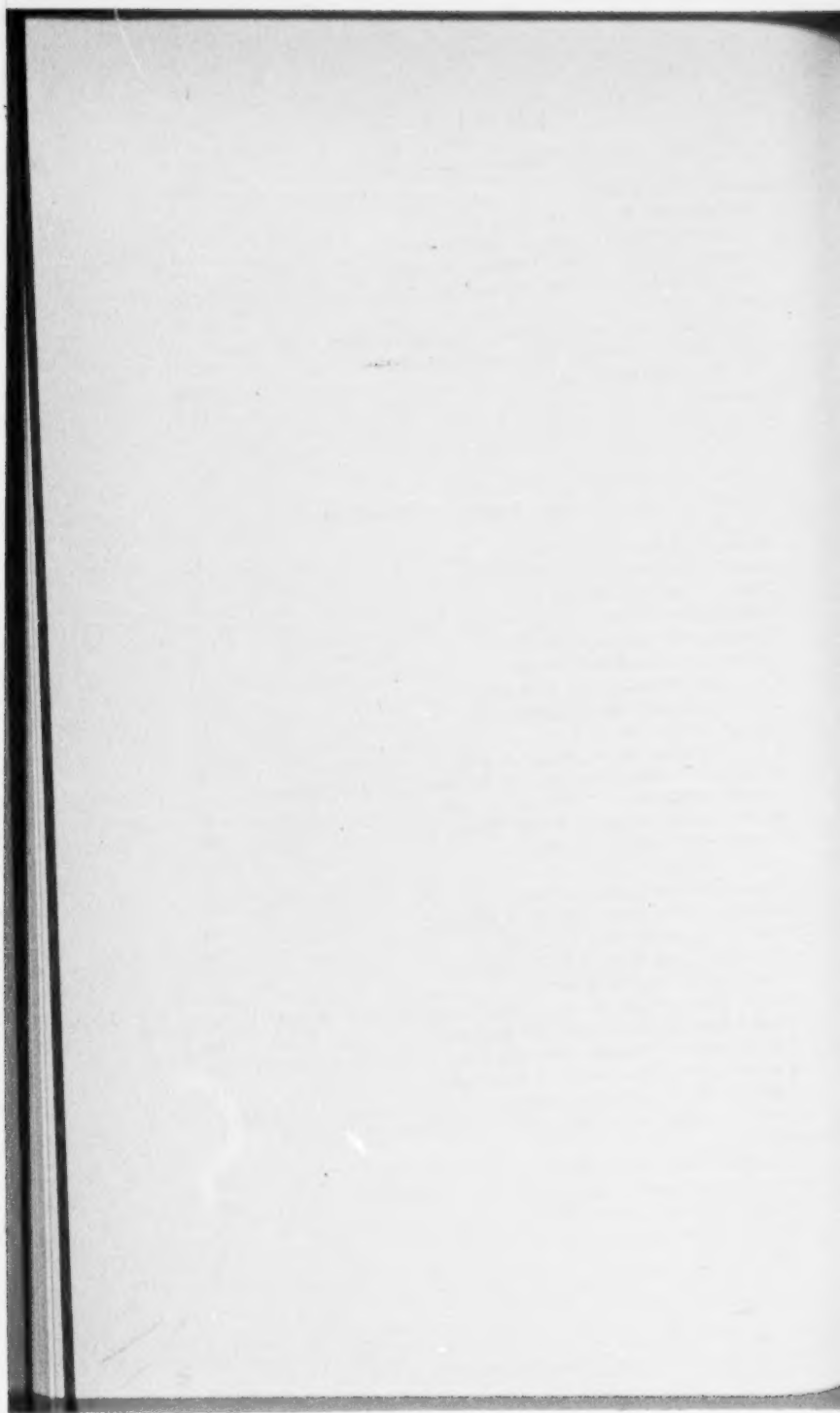
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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

B. I. SALINGER, JR., APPELLANT,	}	No. 341.
v.		
VICTOR LOISEL, UNITED STATES MARSHAL for the Eastern District of Louisiana.		

B. I. SALINGER, JR., APPELLANT,	}	No. 342.
v.		
VICTOR LOISEL, UNITED STATES MARSHAL for the Eastern District of Louisiana.		

APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

B. I. SALINGER, JR., PETITIONER,	}	No. 705.
v.		
UNITED STATES OF AMERICA AND VICTOR Loisel as United States marshal, Eastern District of Louisiana.		

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE APPELLEE AND RESPONDENTS.

On March 13, 1923, the Circuit Court of Appeals
for the Second Circuit (*Ex parte Salinger*, 288 Fed.
752) affirmed an order of the District Court for the

Southern District of New York discharging a writ of habeas corpus and remanding Salinger, the appellant and petitioner in these cases, for removal under section 1014, Revised Statutes, to the District of South Dakota for trial upon an indictment theretofore found against him. The cases at bar are three phases of an effort made by Salinger in the city of New Orleans to defeat the order of removal made upon the mandate which followed that decision.

STATEMENT OF THE CASE.

On May 20, 1922, Salinger, who will be referred to as the defendant, with two others, was indicted by the District Court of the United States for the Western Division of the District of South Dakota for a violation of section 215 of the Criminal Code by using the mails to defraud. The indictment is set forth in the record in No. 341, beginning at page 9. In passing it is necessary to say merely that the alleged fraud was perpetrated through the sale of stock in a corporation called the Midland Packing Company. A bench warrant for his arrest upon said indictment was issued, and on the 13th day of June, 1922, he surrendered to a commissioner for the Northern District of Iowa and gave bond in the penal sum of \$10,000 for his appearance before the District Court for the District of South Dakota on the third Tuesday of October, 1922, and he was thereupon released from custody. He failed to appear, however, his bond was forfeited, and a bench warrant for his arrest issued.

THE PROCEEDINGS IN NEW YORK.

On or about the 17th day of October, 1922, he was arrested in the Southern District of New York, and proceedings for removal were instituted. After a hearing at which he was represented by counsel who raised the same points afterwards urged in Louisiana, he was, on November 8, 1922, committed by a United States commissioner to await an order for removal. On the same day he sued out a writ of habeas corpus and writ of certiorari in the District Court for the Southern District of New York, and after a hearing the writ was quashed and the defendant remanded to the custody of the marshal for removal. He thereupon appealed to the Circuit Court of Appeals for the Second Circuit with the result that the order was affirmed (288 Fed. 752) and the mandate sent down to the District Court on the 14th day of March, 1923. Upon the receipt of the mandate, the District Court, on the 16th day of March, 1923, made its order of removal. Pending appeal the defendant had been given his liberty under a bond for \$10,000, and upon the issuance of the order of removal upon the mandate of the Circuit Court of Appeals he appeared before the District Court and was allowed to give bond for his appearance before the District Court for the District of South Dakota in lieu of removal by the marshal. The bond was for \$15,000 conditioned for his appearance before the South Dakota court upon the opening day of the April, 1923, term, the 3d day

of April, 1923. That bond was dated March 20, 1923, with the Southern Surety Company as surety.

The scene now changes to Louisiana.

THE PROCEEDINGS IN NEW ORLEANS, No. 341.

On the 31st day of March, 1923 (11 days after he had given bond to appear in South Dakota, and 3 days before he was due to appear there), the defendant and one Parsons, an attorney at law of the city of New Orleans, La., appeared at the office of the United States marshal in the city of New Orleans, and Parsons—declaring himself to be attorney for the Southern Surety Company—introduced the defendant to a deputy marshal and stated that he desired to surrender him in behalf of his client, the Southern Surety Company.¹ Parsons thereupon withdrew.

The circumstances of the surrender, as set forth in the return to the writ of habeas corpus, were as follows (R. No. 341, p. 8):

* * * that on the 31st day of March, 1923, petitioner herein and one Edward A. Parsons, an attorney at law, of the city of New Orleans, appeared at the office of respondent, at the Federal Building in the city of New Orleans,

¹ Section 1018. Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

and the said Edward A. Parsons, declaring himself to be attorney of the Southern Surety Company of Des Moines, Iowa, introduced petitioner to a deputy of respondent as one B. I. Salinger, jr., and stated that he desired to surrender petitioner to respondent in behalf of his client, the said Southern Surety Company; that the said Parsons withdrew and the said deputy states to the petitioner that he did not think he had any right to accept his surrender; that thereupon petitioner stated to said deputy that he was a lawyer and protested that the surety had a right to surrender him to respondent, and that any marshal of any district of the United States had the right to accept the custody of a bonded party when he was surrendered by his bondsman even though the party defendant had given bond to appear in a jurisdiction other than the one in which he might attempt to surrender himself; that while engaged in said controversy and argument, and without any act of restraint being imposed upon the petitioner, the commitment issued by Arthur H. Browne, Esq., in the form of the copy attached to the petition herein, was handed to the said deputy, whereupon, almost coincident therewith, the said deputy had received word from the office of the clerk of the United States District Court for the Eastern District of Louisiana to the effect that a writ of habeas corpus had been granted in favor of petitioner, the said deputy being requested by the said clerk, or one of his deputies, to repair to the clerk's office upon the floor of the Federal

Building, immediately below that of the United States marshal's office; that pursuant to said request the said deputy, in company with petitioner, did immediately go to the said clerk's office for the purpose of being served with said writ, the petitioner, in the meantime—that is to say, before actually reaching the clerk's office—having paid the said deputy the sum of \$2 in cash to defray the legal cost of service of said writ upon the United States marshal; that the said writ was then and there delivered to the said deputy, to whom there was presented coincident therewith a bond in the sum of \$5,000, conditioned that the petitioner should appear before the United States District Court for the Eastern District of Louisiana upon the hearing upon the petition of said writ of habeas corpus; that upon examination of said bond by the deputy, and ascertainment that the same was in the amount as provided for by order of this honorable court, petitioner was thereupon released from custody. Respondent shows that the only custody and detention of petitioner was as above set forth, and that he does not now have the custody of petitioner.

The surety upon the new bond thus given was the Southern Surety Company, the same company which, a few minutes before, is said to have surrendered the defendant.

The writ of habeas corpus thus obtained is the one involved in the record in No. 341. To the petition for the writ an answer and return was filed, setting forth

the facts hereinbefore stated with respect to the indictment, the giving of the bond in Iowa, the forfeiture of the bond, the proceedings in New York, and the surrender of the defendant to the marshal in New Orleans.

THE PROCEEDINGS IN NEW ORLEANS, No. 342.

On the 4th day of April, 1923, the District Court in South Dakota entered an order forfeiting the bond which the defendant had given in New York and issued a bench warrant for his arrest. On the 6th day of April, 1923, a complaint was filed with the United States commissioner in New Orleans by the assistant United States attorney, charging the defendant with being a fugitive from justice. He was thereupon arrested, brought before the commissioner, and admitted to bail in the sum of \$15,000. On the 18th of April a hearing was had before the commissioner, evidence of identity of the defendant was produced together with a certified copy of the South Dakota indictment. The defendant offered no evidence, and the commissioner ordered him committed to await further action by the District Court in accordance with law, but provided that he be admitted to bail in the sum of \$15,000 to appear before the District Court for the Eastern District of Louisiana on April 20. He did not give the bond but was committed to the marshal, and on the same day another petition for writ of habeas corpus was filed in the District Court, upon which he was at once admitted to bail which is the petition involved in No. 342.

This petition asked for a writ of certiorari directed to the commissioner as well as for a writ of habeas corpus directed to the marshal. The marshal made return to the writ of habeas corpus, and the commissioner made return to the writ of certiorari, and on April 20, 1923, both proceedings came on to be heard before Judge Foster in the District Court. The defendant's counsel offered in evidence certified copy of the indictment and of an application for an order of transfer to the District Court of the United States for the District of South Dakota, Southern Division, and Salinger and his codefendants, Sawyer and Burlingame, testified orally that they were not physically present in South Dakota between June 1, 1919, and May 10, 1920, the period covered by the indictment. In behalf of the Government the testimony of the deputy marshal was taken, showing the circumstances of the defendant's surrender, and the following documentary evidence was introduced (R. No. 342, pp. 43-46):

Certified copy of bond given by the defendant at Des Moines, Iowa, on the 13th day of June, 1922;

Certified copy of the record before the Circuit Court of Appeals for the Second Circuit;

Certified copy of an order of the District Court for the Southern District of New York dated March 16, 1923, upon the mandate of the Circuit Court of Appeals ordering the defendant to surrender himself into the custody of the marshal and ordering the marshal to

transport him to the District of South Dakota and deliver him there;

Certified copy of the bond given in New York on March 20, 1923;

Certified copies of various records of the District Court of the United States for the District of South Dakota.

Thereupon and on April 26, 1923, Judge Foster, in the District Court made orders that the alternative writs of habeas corpus heretofore issued be recalled, that the applications for a writ of habeas corpus be denied, that the petitions be dismissed, and that the defendant be remanded to the custody of the marshal.

THE PROCEEDINGS IN NEW ORLEANS, No. 705.

The two proceedings, Nos. 341 and 342, were heard together by the court, and identical judgments were entered in each case. At the hearing on April 20 the United States attorney presented a motion praying for order of removal and submitted an order, and it was stipulated that the testimony taken in both cases should be used and deemed to have been taken on the application for warrant of removal. When on April 26, 1923, the court entered its judgments dismissing the petitions and remanding the defendant, it also filed an order of removal. This was treated as a proceeding separate from the habeas corpus proceedings.

The next day, April 27, the defendant presented to Judge Foster petitions for appeal to this court

in both cases, together with certain so-called assignments of error. These appeals were allowed and ordered to operate as a supersedeas upon the filing of undertakings. These undertakings were filed on the same day. However, on April 27, 1923, the defendant filed in the same court another petition for writ of habeas corpus based upon the order of removal and alleging that he was then imprisoned and that the warrant of removal was the sole claim and authority for his detention. He alleged the judgment of the court dismissing the two petitions, the allowance of the appeals notwithstanding which the court refused to stay the warrant of removal pending the decision of the Supreme Court of the United States upon the appeals. This is the petition which is involved in No. 705. To this petition return was made, and after a hearing and on April 28, 1923, the proceeding was dismissed and the defendant remanded to the custody of the marshal. From this judgment an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. The District Court refused to allow such appeal to operate as a supersedeas, but it was allowed by Circuit Judge Walker on April 30, 1923. This appeal to the Circuit Court of Appeals came on to be heard before that court on the 3d day of December, 1923, and was argued. After it was argued, and before it was decided, the defendant, on the 10th day of December, 1923, filed in this court a paper entitled:

Petition or motion of B. I. Salinger, jr., for relief, in aid of his rights created by super-

sedeas and bail obtained in causes Nos. 341 and 342 of said term, and to stop interference with the jurisdiction of this court.

This petition, or motion, was served upon the Solicitor General about 10.45 o'clock in the forenoon of December 10, and of course there was no time to prepare an answer to it or to make adequate preparation to contest it. It is worthy of note that neither this petition nor any of the other petitions set forth the proceedings in New York culminating in the removal order to which defendant gave bond. The substance of the complaint made in that petition was that the courts below and the officials of the Department of Justice were attempting to deprive the defendant of the benefit of his appeals to this court. It was alleged that he had been arrested in the city of Chicago pending the appeals, but the present status of that proceeding does not appear. It was also alleged that an attempt had been made to arrest him in New York City. It was also alleged that the Circuit Court of Appeals in the Fifth Circuit, when the case came on to be argued before that court, made an order committing him to prison pending the determination of the cause, and that he was even then unjustly and unlawfully detained pursuant to the order of that court. Something was stated in the petition with regard to remarks made from the bench during the hearing by the Circuit Court of Appeals, and the defendant alleged in his petition "said remarks from the bench indicated that if there be an affirmance petitioner would not be enlarged

on bail, but would have to submit to immediate removal on the order of the District Court, and that he was being summarily imprisoned so there might be no possibility of further offense consisting of availing himself of the right given him by law to appeal to other courts as long as the order against him was one that he be remanded." He urged that he was unlawfully detained and restrained of his liberty and about to be deprived of the benefit of his appeals, and his prayer was that writs of habeas corpus, certiorari, injunction, or other lawful writ, be granted, to the end that the interference with the jurisdiction of the court herein complained of and any others may be prevented, and for such other relief or writ as may be proper in the premises. This court, on the same day, made an order granting a certiorari to the United States Circuit Court of Appeals, directing that all further proceedings by said court other than the announcement and delivery of the opinion by such court in such cause be stayed; that the defendant be admitted to bail pending the consideration and disposal of the cause by this court upon giving bond in the sum of \$10,000 conditioned for his appearance and surrender pursuant to the ultimate order of this court, and for his obedience to that order and to any intervening order in the cause which this court may make, and further directing that the three cases be especially assigned for hearing on January 14, at the head of the call for that day. So the snarl is here to be untangled.

ARGUMENT.

I.

It was the obvious duty of the District Court in Louisiana to order the defendant's removal.

All this seeming complication presents, as we think, but one substantial question. All the rest is mere detail tending to confuse the real point. When Salinger and the alleged representative of the Southern Surety Company visited the office of the United States marshal in New Orleans and went through the form of surrendering to the marshal, there was outstanding an order of the District Court of the Southern District of New York, entered pursuant to a decision of the Circuit Court of Appeals for the Second Circuit, directing the removal of Salinger to the District of South Dakota. The right of the United States to this order had been tested by Salinger upon habeas corpus, and the judgment of the Circuit Court of Appeals overruling his contentions was final unless revised by this court on writ of certiorari. No application for certiorari was pending, nor has any such application been made, and the time to make it has long since expired. The order of removal was therefore based upon a final judgment, conclusive against the whole world and binding upon every court in this country, including this court. *Ex parte Watkins*, 3 Peters 193. In that case this court, speaking by Chief Justice Marshall, said, at page 202:

This writ is, as has been said, in the nature of a writ of error which brings up the body

of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment and reexamine the charges on which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it.

The inquiry before the court in New York was whether Salinger could be removed under section 1014, Revised Statutes, for trial in South Dakota, and it had put an end to that inquiry by deciding it. Thereupon, Salinger gave bail in order to avoid physical removal by the marshal. Assuming for the purpose of the argument that the so-called surrender in New Orleans was regular and such as is contemplated by section 1018, Revised Statutes, the custody of the Louisiana marshal was the same as would have been the custody of the New York marshal had Salinger not given bail, and that was custody under the final judgment of removal. It is difficult to see what question was open for consideration by the Louisiana court.

But it said that an order refusing or discharging a writ of habeas corpus is not *res judicata* so as to prevent another application for the writ. In a general way this may be true. It is also true that the fundamental principle of *res judicata* applies in criminal cases (*United States v. Oppenheimer*, 242 U. S. 85) and that a judgment in habeas corpus proceedings discharging the prisoner may operate as *res judicata* of the issues of law and fact necessarily involved in that result (*Collins v. Loisel*, 262 U. S. 426).

The writ of habeas corpus, however, is applicable to many situations, and we have in removal proceedings a unique situation. Section 1014 of the Revised Statutes² provides merely a means of arrest, of bringing an accused person before the court in which a charge is pending against him. *Beavers v. Haubert*, 198 U. S. 77.

When arrested in a district other than that where the charge is pending, he may be imprisoned or may give bail. If he gives bail, he is not imprisoned.

² Section 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

of 1018 Revised Statutes. The provisions of that statute were complied with and the commissioner committed him to the custody of the United States marshal for the Northern District of New York. He then sued out a writ of habeas corpus. The court held that when, in the first instance, he waived examination and gave bail, he was thereafter entitled to no further examination, and said:

But if the defendant contends that when he was surrendered by his bail, his being under bail being but a continuance of his original imprisonment, he was relegated to the same position and rights he held and had at the time he was held to bail by the commissioner and before he entered into the bond required. That he then had the right to refuse to give bail and to bring up the whole question of the validity of the holding of the commissioner by writ of habeas corpus before or at the time the order of removal was applied for and that, being now in custody, he has the same right. That he could not and has not waived that right. If this contention be true then defendants in these proceedings may indefinitely postpone and delay removal to the district where the indictment is found. The defendant when arrested and brought before the commissioner will waive examination. If held to bail he will give it and when the court at which he is to appear and answer is about to convene he will procure his bail to surrender him and then demand an examination and sue out a writ of certiorari and a writ of habeas corpus and compel the court to inquire into the legal-

ity of the proceedings, including the validity of the indictment and the jurisdiction of the commissioner. If judgment goes against him and the writ is dismissed and a warrant of removal is granted he may appeal, and if the order dismissing the writ is affirmed he is entitled to then give bail for his appearance in the court where the indictment was found. When that court is about to convene he may procure another surrender by his bail and sue out another writ. Quite likely this writ will be dismissed, but in the meantime witnesses may die or go beyond the jurisdiction of the court and the administration of justice be greatly delayed if its ends are not wholly defeated.

We are not called upon in this case to consider whether or not the defendant had any right to a writ of habeas corpus after he had forfeited the bail bond which he gave in Iowa on June 13, 1922. The rights of his sureties on that bond have been stated by this court in *Cosgrove v. Winney*, 174 U. S. 64, quoting from *Taylor v. Taintor*, 16 Wall. 366, 371, as follows:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that can not be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sab-

bath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In (*Anonymous*) 6 Mod. 231, it is said: "The bail have their principal always up on a string, and may pull the string whenever they please, and render him in their own discharge." The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and can not cast them upon the obligee.

It may possibly be true that bail given to an indictment absolutely void is itself void, but we have gone a step beyond that question, for the bond given to the United States District Court on March 20, 1923, was not given to a void indictment. The validity of that indictment for removal proceedings was not then open to question. The Circuit Court of Appeals had put an end to that inquiry by deciding it. *Ex parte Watkins*, 3 Peters, 193. The question had been litigated by the defendant upon writ of habeas corpus in a court of competent jurisdiction and decided, and that decision affirmed by a court whose decision was final. Therefore, when Salinger gave bail to the New York court in lieu of removal by the marshal, the bail itself was valid, and there was nothing left for any court in the United States to do, when he procured himself to be surrendered by that

bail, except to carry out the removal order of the New York court.

When he said, in his petition to the Louisiana court for habeas corpus, that the sole claim and sole authority by virtue of which the marshal restrained and detained him was a certain paper purporting to be a commitment, a copy of which was annexed to the petition, and that said commitment was issued by virtue of a certain indictment found against him in the District Court of South Dakota, he was, to say the least, not candid with the court. The marshal was holding him because his bondsman had surrendered him. The commitment which he had induced the commissioner to sign and which had obviously been drawn and attached to the petition before the form of surrender was gone through with, contained nothing with respect to the proceedings in New York, and it was an untrue statement that the commitment was issued by virtue of a certain indictment. The commitment was issued at the solicitation of the defendant because of the surrender. He had procured his own arrest to avoid fulfillment of his obligation under his bond. When the actual circumstances and facts of the case were revealed to Judge Foster, and he became aware of the deception that had been practiced upon him, and the abuse of the process of his court had been revealed, we can readily understand why he made the judgment which he did, recalling the writ which he had issued, denying application for the writ, and dismissing the petition. This same lack of candor has been practiced

from that time to the present. In no one of the petitions which the defendant filed in New Orleans did he set forth the facts respecting the removal order made in New York or the decision of the New York court. Nor did he set forth those facts in the petition which he filed in this court for certiorari. These cases, therefore, and all these proceedings narrow down to the single question, shall the removal order made by the court in New York be enforced—an order made by a court of competent jurisdiction in a proceeding tested by the defendant himself upon habeas corpus, reviewed at his instance by the Circuit Court of Appeals for the Second Circuit, whose decision is made by statute final? The only question for this court to decide is whether it is final or not. If it is not final, then no decision can be final, not even a decision of this court. The defendant has given bond to appear and answer the judgment of this court. If the tactics he has pursued may be tolerated, he can, if the decision be against him, go before some United States Marshal somewhere in the United States, surrender himself, secure a writ of habeas corpus if he can find a judge to give it to him, give a new bond and start the whole thing over again.

II.

The indictment.

Should the Court deem it necessary to consider the indictment upon this state of the record, the following considerations are pertinent.

The indictment is brought under section 215 of the Criminal Code which, so far as it pertains to the offense here charged, reads as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any postoffice, * * * to be sent or delivered by the postoffice establishment of the United States, * * * or shall knowingly *cause to be delivered by mail according to direction thereon*, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

The indictment was found in the District Court of the United States for the Western Division of the District of South Dakota. It was found as appears from the face of the indictment by grand jurors summoned "from the body of the district aforesaid" and charged to inquire and true presentment make for "said district of South Dakota." The indictment consists of 14 counts and, stated briefly, charges:

That the defendants organized the Midland Packing Company, an Iowa corporation, with a capital

stock of \$3,500,000, afterwards increased to \$8,000,000.

That the defendant, B. I. Salinger, jr., was vice president and general counsel of that company.

That the defendants bought a packing plant for \$250,000 but caused to be issued stock of the par value of \$485,000 therefor, delivering but \$250,000 thereof to the vendors, and converted the difference to their own use.

That the defendants misrepresented the price paid for the property to the Executive Council of the State of Iowa in connection with an application to it for authority to issue its capital stock, and also to the South Dakota State Securities Commission for the purpose of securing authority from that commission to sell the capital stock in the State of South Dakota, and also to prospective purchasers of said stock.

That in order to secure subscriptions to the stock defendants declared and paid a dividend of 7 per cent at a time when the company was insolvent.

That defendants entered into arrangements with pretended subscribers which showed large subscriptions to the stock, which were false, the effect being to permit the paying of large commissions to themselves and to resell the stock so fraudulently subscribed to other parties. The defendants converted the difference to their own use.

That defendants at the time of making these and other false representations knew them to be false.

That in execution of the scheme the defendants caused to be delivered by mail in the Southern Division of the District of South Dakota letters and circulars which had previously been posted in Iowa for mailing and delivery to "victims" within the District of South Dakota.

The point which has been raised by the defendant here and in the court below and before the District Court in the Southern District of New York and the Circuit Court of Appeals for the Second Circuit is that the indictment was void because it was found by a grand jury sitting in the Western Division of the District of South Dakota and alleged an offense committed in the Southern Division of that district. That question was squarely presented to the Circuit Court of Appeals for the Eighth Circuit and a similar indictment sustained. *Biggerstaff v. United States*, 260 Fed. 926. That decision was followed by the Circuit Court of Appeals for the Second Circuit in the present case (*Ex parte Salinger*, 288 Fed. 752) and by the Circuit Court of Appeals for the Fifth Circuit in the decision just handed down in No. 705. Summoning the grand juries from the body of the district seems to be in accordance with section 277 of the Judicial Code, which section is applicable to grand as well as petit juries. *Agnew v. United States*, 165 U. S. 44. By section 53 of the Judicial Code it is provided that "all prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the

defendant, shall order the cause to be transferred for prosecution to another division of the district."

After the indictment was returned the court ordered it transferred for trial to the southern division of the district. The order was made in open court in the presence of defendant's counsel, but he has urged from the start that this transfer was illegal because not made upon his motion, but it will be observed that the motion referred to in the portion of section 53 just quoted is a motion for transfer to *another division than that in which the crime was committed*. The order in the present case was for transfer to the division where the crime was committed.

This practice is approved by the Circuit Court of Appeals for the Eighth Circuit. *Biggerstaff v. United States*, 260 Fed. 926.

In the *Biggerstaff* case the offense was charged to have been committed in the Chadron Division of the District of Nebraska. The indictment was found and returned in the Omaha Division by a grand jury drawn from the district at large but thence transferred to the Chadron Division for trial. There was a demurrer to the indictment, which specified as a ground that the finding and return of the indictment in the Omaha Division was contrary to section 53 of the Judicial Code. In sustaining the indictment the court, by Circuit Judge Hook, said:

The point made turns upon the meaning of the word "prosecutions" as employed in the statute; that is to say, whether a prosecution includes the inquiry of the grand jury and the

finding of the indictment. It was proper to draw the grand jurors from the district at large. *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243. And if the indictment was lawfully found in the Omaha Division, it was lawfully returned there, provided it was afterwards transferred to the proper division for trial. The return of an indictment is naturally made to the court and at the session where the grand jury is performing its functions. We think the term "prosecution," in this statute, means the proceedings which follow the finding and return of the indictment, and does not embrace the preliminary inquiry and the making of the accusation. Until the latter is done there is no case or cause against the accused to be prosecuted. While persons are sometimes held in bail or confinement to await the action of a grand jury, it is not always so. That is merely precautionary. It is the process on the indictment which brings them into court to answer the accusation. It does not necessarily follow that the proceedings of a grand jury are specially directed at the person finally accused. There may at first be no formal charge against any particular person. The probability of the commission of a public offense and of the identity of the perpetrator may not be disclosed until the conclusion of their investigations. Even the locality of the criminal act, whether in one division or another, may at first be in doubt. Except as to some fundamental requirements in respect of the constitution and conduct of grand juries, the persons finally

indicted are not entitled to subject their proceedings to the scrutiny and tests of a trial. *McKinney v. United States*, 199 Fed. 25, 117 C. C. A. 403. In *Blair v. United States*, 250 U. S. 273, 39 Sup. Ct. 468, 63 L. Ed.—, the court, in speaking of a grand jury, said:

“It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning.”

While the inquisition of a grand jury is essential, it is preliminary, and not a part of the definite prosecution of any particular individual. It is in this restricted sense that the term is used in the statute, though in other relations it may have a broader meaning. As confirmatory of this it will be observed that the same section also authorizes the court or judge, upon the application of the defendant, to “order the cause to be transferred for prosecution to another division of the district.” Doubtless the same meaning was intended in both connections. It is the cause which follows the indictment that is prosecuted. Still further, in the copies of the Judicial Code prepared under the direction of the Judiciary Committee of the Senate

and published by authority of Congress, there is a note to section 53 which says of the provision we have last quoted:

"The purpose of this latter provision is to facilitate the early disposition of criminal cases, especially in minor cases, where the defendant is unable to give bail, and may, in view of the fact that in many divisions but one term of court is held each year, possibly be compelled to remain in jail nearly a year before a trial may be had or before an opportunity will present itself for him to plead guilty."

Manifestly this purpose might often be frustrated, where persons are confined in default of bail to await the action of a grand jury, if it were held that the proceedings of the grand jury, including the finding and return of an indictment, must be in the division in which the offense was committed.

The only decision of a Federal court holding contrary to the *Biggerstaff* case is *United States v. Chennault*, 230 Fed. 942. This was a decision by Judge Foster in the District Court for the Eastern District of Louisiana rendered January 26, 1916. This decision was rendered before the decision of the Circuit Court of Appeals in the *Biggerstaff* case, which, since it was made, has been accepted as establishing the practice. The fact that it was rendered by Judge Foster is a sufficient explanation of why Salinger sought the Eastern District of Louisiana as a forum in which to attempt to escape the decision of the Circuit Court of Appeals for the Second Circuit.

The other point made by the defendant in all the courts has been that under section 215 of the Criminal Code the only place where the crime could be committed was in the district in which the letter was mailed, and he has relied upon the case of *Stever v. United States*, 222 U. S. 167. The *Stever case*, however, involved a construction of 5480 of the Revised Statutes, which differs from section 215 of the Criminal Code by its omission of the very words upon which this indictment is based, namely, "cause to be delivered." Section 215, as it now stands, is not the section which was construed by the Supreme Court in the *Stever case*.

This precise question has been before the Circuit Court of Appeals for the Eighth Circuit and there decided adversely to the defendant. *Moffatt v. United States*, 232 Fed. 522. The decision in the *Moffatt case* was followed by the Circuit Court of Appeals for the Second Circuit in the present case (288 Fed. 752). As the latter court points out (p. 755), "the indictment in this case seems in form to be a mere copy of the *Moffatt* indictment." The following authorities are, by analogy at least, strongly against the contention of the defendant on this question: *In re Palliser*, 136 U. S. 257; *Benson v. Henkel*, 198 U. S. 1; *Hyde v. United States*, 225 U. S. 347; *Brown v. Elliott*, 225 U. S. 392.

The indictment surely is sufficient to support a removal proceeding.

CONCLUSION.

The appeals in Nos. 341 and 342 should be dismissed for lack of jurisdiction. The only ground upon which any claim of jurisdiction by direct appeal from the District Court could be based is that a constitutional question is involved. No such question arises upon the record. The place to which these various attempts to remove Salinger for trial have been made is the State and district and division in which the crime was committed. Therefore, the provisions of the sixth amendment to the Constitution are satisfied.

The only question of jurisdiction is that of the South Dakota court. Such question does not give a right of direct appeal to this court. (*Pothier v. Rodman*, 261 U. S. 307.)

The only questions of construction are (1) the meaning of the word "prosecution" in section 53 of the Judicial Code, and (2) the meaning of § 215, of the Criminal Code. Such questions do not give this court jurisdiction of an appeal direct from the District Court. *American Sugar Refining Company v. United States*, 211 U. S. 155; *Sloan v. United States*, 193 U. S. 614; *United States ex rel. Taylor v. Taft, Secretary*, 203 U. S. 461. The point would seem to be much like that involved in the case of *United States ex rel. Mensevich v. Todd*, No. 148 of the present term, argued and decided from the bench on January 2, 1924. In that case the statute required deportation of aliens to be to the "country whence

they came." The order for deportation directed that Mensevich be returned to Poland. The place from which he came was, when he left it, included in Russia, but at the time the order was made it had become part of Poland. This court held that no constitutional question arose.

In the case of *World's Columbian Exposition v. United States*, 56 Fed. 654, Mr. Chief Justice Fuller, sitting as a circuit justice, said at page 667:

Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws.

In No. 705, the cause should be remanded to the Circuit Court of Appeals with direction to that court to enter judgment in accordance with the opinion which it has rendered.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
*Special Assistant to
the Attorney General.*

JANUARY, 1924.

Office Supreme Court, U. S.

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WM. R. STANSBURY

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

Nos. 341, 342, 705.

B. I. SALINGER, JR., *Appellant*,

vs.

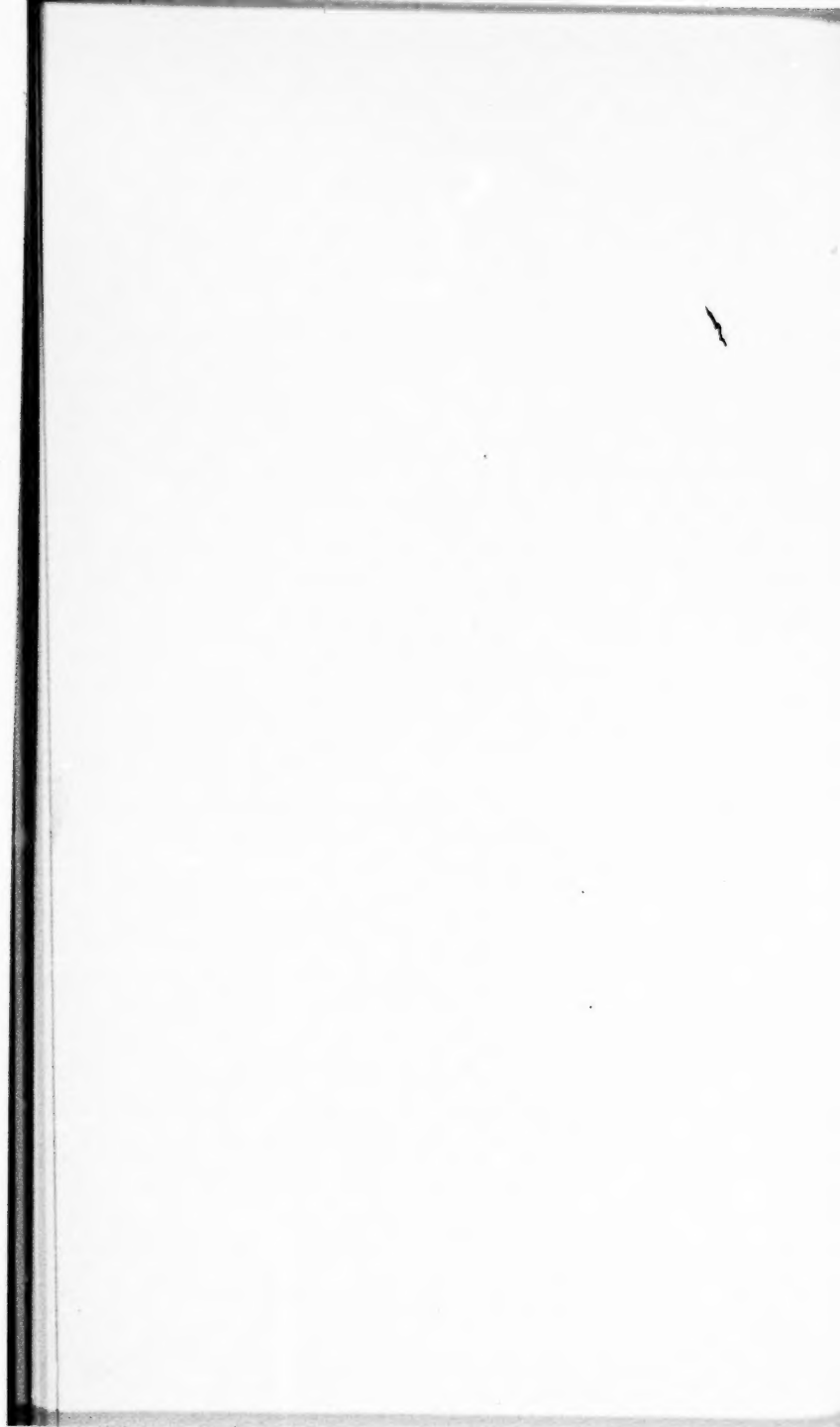
VICTOR LOISEL, MARSHALL, *et al.*

RESPECTIVELY APPEALS FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE EASTERN DISTRICT OF
LOUISIANA AND CERTIORARI TO THE CIRCUIT COURT
OF APPEALS OF THE FIFTH CIRCUIT.

REPLY BRIEF.

B. I. SALINGER,
Attorney for Appellant.

ST. CLAIR ADAMS,
L. H. SALINGER,
On Brief.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

Nos. 341, 342, 700.

B. I. SALINGER, JR., *Appellant*,

vs.

VICTOR LOISEL, MARSHALL, *et al.*

RESPECTIVELY APPEALS FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE EASTERN DISTRICT OF
LOUISIANA AND CERTIORARI TO THE CIRCUIT COURT
OF APPEALS OF THE FIFTH CIRCUIT.

REPLY BRIEF.

PREFATORY STATEMENT.

Respondent tells you in various ways that there is
“but one substantial question” and that “all the rest
is mere detail tending to confuse the real point.” (13)
That “real point” is asserted to be the action of the

Circuit Court of Appeals for the Second Circuit. For that action the respondent claims that it bars present consideration of whether appellant ought to be removed on a South Dakota indictment.

One amplification is the argument that "the cases at bar are three phases of an effort made by Salinger in the City of New Orleans to defeat the order of removal made upon the mandate which followed" the decision of said Circuit Court of Appeals. (2) Another amplification is that the removal proceedings in New Orleans, upon which the cases in this court rest, were in fact nothing but a continuation of the New York proceedings; that their basis was nothing but an order of removal issued in New York on the mandate of the Circuit Court of Appeals of the Second Circuit; that said order of removal was final and binding upon all courts and that, therefore, "it is difficult to see what question was open for consideration by the Louisiana Court." (13, 14.)

Still another amplification is that somehow the giving of two bail bonds and their forfeiture bar appellant from now resisting removal.

It is a fair claim to say that the brief for the respondent is practically confined to the presentation of these contentions.

We respectfully submit that so far from being the "one substantial question" in the case, the matters so strenuously urged present an immaterial question, and its presentation and not the real substance of the cases is what "tends to confuse the real point."

The "real points" are whether one may be removed to be tried in the District of South Dakota under an indictment which charges no offense other than a mailing done in the Northern District of Iowa; whether

such removal is warranted where the undisputed testimony is that the indietee was not in South Dakota at any material time—in a word whether the Constitution is suspended so far as appellant is concerned. Another such point is whether under a statute that commands prosecution to be had in the division where it is charged the offending took place, the accused may be removed for trial to a division in which it is not charged that any offense was committed; another, whether under a statute that commands prosecution to be had in a division wherein it is charged the offending was done unless the *defendant* obtains a transfer to another division, he may be removed for trial to such other division where the transfer was made on the application of the *Government*; another, whether there should be a removal upon an indictment which as to the gist of the offense—mailing in execution or attempted execution of the scheme alleged—sets forth letters which show on their face that when they were written and mailed the addressees had been already defrauded, if defrauded at all; and still another, whether there should be such a removal on an indictment which leaves out one essential element of the offense, intent to defraud, for in that while the alleged scheme is to cheat by obtaining money for shares of stock, there is no allegation as to the value of the shares nor claim that they were not worth all that was obtained for them.

The argument of the respondent recalls Sergeant Buzfuz with his dramatic emphasizing to the jury the awful crime of Mr. Pickwick in having written a note to Mrs. Bardell about chops and tomato sauce. The whole weight of this argument is addressed to a reiteration of the awful offense of having done precisely

what judges such as Mr. Justice Nelson and Mr. Justice Field say the law permits in aid of liberty. There is also reiteration of the immaterial fact that bail bonds were given and ordered forfeited. It would be just as strong an argument to assert that appellant may not have his Constitutional rights because he has dared to appeal to this court or because he did not give bail bonds when he might have done so.

What respondent asserts to be the only substantial question is a bottle of smoke. If the indictment charges an offense which is triable in the district and division wherein trial is sought, there is an end. In that case there must be a removal if appellant had never offended by making one successive application for the writ or offended by giving bail bonds. Per contra, if the demanding tribunal has no jurisdiction over the subject matter the applications in Louisiana add nothing to jurisdiction; neither is it added to by anything connected with the bail bonds. In a word, if there be no jurisdiction, nothing that appellant has done or can do can confer it. If that be not so, then as to one who was born without legs it might be claimed that something done by someone else worked it that the other at all times had two legs.

The writer had no part in this litigation until he presented the appeal to the Circuit Court of Appeals for the Fifth Circuit, but he finds it easy to reconstruct what occurred.

Judge Mack denied habeas corpus and ordered removal. Appeal might have been taken to this court, but through mistake in law was instead taken to the

Circuit Court of Appeals for the Second Circuit. It affirmed. It displays the attitude of being counsel for the Government. Three decisions of this Court, each directly in point on the vital phases of this litigation, were presented to that circuit court. Its opinion does not so much as mention either. The Government presented two Circuit decisions also in point. The appellant conceded the existence and the scope of these two decisions, but sought to avoid them by making argument tending to prove that both were opposed to the said decisions of this court; that neither of them mentioned those decisions; that one was, moreover, a bald dictum and the other based on a misapprehension of a statute and was as well utterly violative of reason and of the numerous decisions which declare indictment to be a part of a prosecution. The opinion of the Circuit Court of Appeals merely said it would follow these two Circuit decisions and made no mention whatever of the attempted avoidance. The same court had recently held that the mailing of the letters was still the gist of the offense. Its opinion does not mention that decision, and it affirmed a removal though the mailing was not done in the district to which removal was sought. It speaks of division lines as being but a matter of form. This, in the teeth of the Post case, 161 U. S., and other decisions that division lines are jurisdictionals.

In a word, the opinion shows on its face that there was no judicial consideration behind it. And the fact that appellant furnished an exhaustive argument is no proof that same was considered. The proof seems to be that none but appellant worked. Consistently with this lack of judicial quality, the court swept aside its own rules which gave fifteen days wherein to apply

for a rehearing by promptly issuing mandate practically at the moment when the opinion was filed. To be sure, certiorari might have been attempted; but evidently that was thought not to be as effective a proceeding as some other might be. At any rate, the time came when appellant must either submit to physical removal or give an appearance bond. Under this constructive duress, he did give such bond. It still remained true that the New York decision did not have much standing as a precedent, and, if not an adjudication, there was nothing wrong in attempting something that might bring either a fuller consideration or the opportunity to bring the matter before this court.

A surrender took place in New Orleans. That furnished the required custody essential to suing out a writ of habeas corpus. Much is said in condemnation of this procedure. It is urged that it is collusive. We have but to say that the well considered case of *Grice* 79 Fed. 627 squarely holds it to be lawful to make surrender to get the technical basis of custody and so obtain writ in order to test the constitutionality of a law.

Habeas corpus writs were obtained. At this point respondent argues that these habeas corpus proceedings really involved nothing but enforcing the New York order of removal. The ready answer is, and we will presently demonstrate, that this warrant could not have been the basis and that at any rate it was not the basis because the New Orleans proceedings were in terms based upon the South Dakota indictment. A hearing was had. It resulted in remand. The court allowed appeals to this court on condition that supersedeas bail bond be given. It was given. Despite

that, the court insisted that removal must take place. Respondent says that while this was perhaps unwarranted it should be excused because the judge was righteously angry at the fraud practiced upon him; to wit, concealing the existence of the New York proceedings at the time when the writs were applied for. The claim of deceit is tenuous. There could have been no intention to deceive. It was well known, of course, that when hearing should be had the South Dakota authorities would be informed of it, and in fact the District Attorney for South Dakota was present at the hearing and put the New York proceedings into the record. Those proceedings were not mentioned in the application because they were thought to be immaterial, not because there was either desire to conceal them or any hope that they would remain concealed.

The judge of the court who ordered the remand said nothing about New York proceedings or adjudication. It is true he made order recalling a writ and wording it as if one had not yet issued other than an alternative writ, and worded as if no hearing had ever taken place. The application was not for an alternative writ but for the usual writ, and order was made that it should issue as prayed. This perversion of the record exhibited in this order, therefore, was not due to any indignation because the New York proceedings were not mentioned in the application but were evidently the basis for the subsequent attempt to remove applicant despite his appeals to this court; for in cases where the application for the writ is denied appeal does not relieve from custody. If deference for the New York Court was profound, there was none for the jurisdiction of this court and its supersedeas. The claim that the application had been denied was for the purpose of keeping this appellant in custody on the the-

ory that this was a case where the writ had been refused, when in fact it had issued and hearing thereon had been had.

From this situation supersedeas from the Circuit Court of Appeals of the Fifth Circuit relieved appellant. And I may add in passing that he would not be guilty of any grave offense if despite the decision of the last named court he had attempted another application for the writ of habeas corpus.

When his hearing before that court came on he was physically present. He was entitled to remain at large pending decision in this court. He was entitled to remain at large pending the decision of said Circuit Court for there, too, he had been required to give and had given a supersedeas bail bond. The record shows that said court summarily ordered him imprisoned while present in court and the record attempts no explanation or justification of this unheard of proceeding.

While in the judicial frame of mind indicated by this proceeding, the court proceeded to its decision. When its opinion came, it justified the action of Judge Foster in attempting a removal while the appeals in this court were pending. It does it by manufacturing three warrants of removal when but one exists, and by holding that while the appeals here took care of two of the warrants it left matters wide open on the third one. It misapprehends a vital point by conceiving that it was asked to give appellate review to the decision in the Second Circuit. Of course no such review is involved. It declares it would be unseemly to pass upon what the court in the Second Circuit has passed. If that be so, judges like Nelson, Field and other Federal judges of high standing but too num-

erous to mention have been guilty of unseemly conduct; so have the judges of England and of British Columbia; and the courts of last resort in New York, Massachusetts, Maine, Wisconsin, Kentucky, Kansas, Oklahoma, Missouri, Minnesota, North Dakota.

The court emphasized its deference to the New York court by following its methods. It made no mention of the three cases in this court that were cited to it. It, too, cited nothing but the two Circuit Court cases without mention of the avoidances urged against them. It, too, ignored its own decisions. In the Whitehead case 245 Fed. at 388, it had ruled that under the statute as now amended the mailing was so completely the whole of the offense as that it was immaterial if the letter that had been mailed never reached the addressee. In spite of this and without mention of it, it found in the case before it that there should be a removal to be tried in South Dakota because of letters mailed in Sioux City.

The summation is that the case of appellant stands as if he had never obtained writ in New York. All that his conduct has worked is that two precedents have been created that would not have existed had he not made the successive application. Enough has been said to indicate why we claim that those precedents should not be followed in trampling upon the Constitution of the United States and the statute law thereof.

BRIEF OF THE ARGUMENT.

I.

THE CLAIM THAT DIRECT APPEAL TO THIS COURT DOES NOT LIE.

This claim is based on the argument that nothing but the jurisdiction of the South Dakota court is involved and that the naked lack of jurisdiction will not base a direct appeal to this court. The answer is that here is more than a naked claim that jurisdiction is lacking. The claim is that jurisdiction is lacking because of constitutional provisions. In other words, appeal here lies because the applicability of the Constitution is involved. See *Pereless*, 157 Fed. 419; *Greene*, 53 Fed. 106, 107; *Fries* 284 Fed. at 827; *Tillinghast*, 225 Fed. at 832.

This question of the applicability of the Constitution bases the direct appeal. *Horner*, 243 U. S. 247; *Spreckles*, 192 U. S. 397; *Alaska Fishery Co.*, case 39, Sup. Ct. 208, 210.

Cases identical in all except in the name of the courts below and the name of the litigants have been entertained here. That is to say, there was remand below and appeal here. See *Tinsley*, 205 U. S. 20; *Greene*, 183 U. S. 249; *Benson*, 198 U. S. 1; *Beavers*, 194 U. S. 703; *Brown vs. Elliott*, 225 U. S. 392.

The point was squarely raised. See Par. 6, p. 2—341; Par. 4, p. 55—341; Par. 11, p. 79—341; Par. 2, p. 95—341; Par. E., p. 3—342; Par. 11, p. 83—342.

There is also jurisdiction here because the point is raised that if Section 215, Penal Code, is construed to permit trial in South Dakota it violates the constitution. And it is familiar doctrine that such point gives this court jurisdiction to entertain direct appeal.

And so does any violation of constitutional guarantees: *Ex Parte Nielson*, 124 U. S. 309; 131 U. S. 176.

One constitutional question raised is whether the indictment is not so prolix as to violate the guarantee of the Constitution that accused is "to be informed of the nature and cause of the accusation." (For example, see par. 16, p. 101—342.)

A constitutional question is also raised by the fact that removal was ordered although it was the undisputed testimony that none of the indictees were in the District of South Dakota at any material time.

II.

AS TO THE STEVER CASE, CONSTITUTING STARE DECISIS.

The indictments are identical. The Stever decision states that the final sole claim for venue in the district where delivery was made, is that there "defendants caused the letter mentioned to be delivered by mail to the person addressed."

It is true the amendment was not effective so far as Stever was concerned. But its very words were the reliance of the Government in the Stever case, as they are in the case at bar. In his brief respondent says that "the very words upon which this indictment is based" are "causing to be delivered." (30).

Those words as said were in the Stever case. They are in the indictment at bar. They were relied on in both cases. The amendment has those words. The Government contended that they were in the original statute, in substance. They *are* there in effect. For the original prohibits the devisors of schemes from mailing letters in aid of that scheme. When they mail them they cause delivery. When they deposit a letter

in aid of a fraudulent scheme devised by them, of course they act "knowingly." All this being so, this court was asked to decide and did decide what effect "knowingly causing delivery" had upon venue.

It is worthy of note that through the entire course of the opinion in the Stever case, nor anywhere in the briefs in it, is there a suggestion that it is of importance that the amendment is not effective as to Stever. The entire trial theory is that the amendment was in substance in the original and that the effect of this was for decision. The holding that the lottery statute cannot be borrowed for the Stever case does not refer to the words in that statute "causing to be delivered," but to the elective venue provision in that statute.

The Government contended in the Stever case that the amendment had made no change so far as venue was concerned. The judicial construction is that the amendment worked a change in substance. That being so, it does not work alteration in the place of trial because venue provisions are matters of procedure and not of substance. It is obvious that the object of the amendment was to reach a new class of offenders rather than to create a new class of offense. The word "knowingly" proves that. As already said, those who devise schemes were covered by the original. The amendment sought to reach those who had not participated in devising the scheme but who might, to be sure act innocently, and also might act "knowingly" in helping in the use of the mails to aid a scheme devised by others than themselves. See Foster, 178 Fed. 171.

The Stever decision had the right to consider the words of the amendment which were also in the indictment before them, if for no other reason than that it is never a *dictum* to construe statutes in *pari materia* (36 Cyc. 1144, 1146; Mitchell, 98 Va. 459; Crawfordsville, 104 Ind. 97; Gilbert, 67 Kans. 346; 25 R.C.L. (Statutes) 285).

III.

WHAT THE STEVER CASE, 222 U. S. 167, EXPRESSLY RULES WOULD BE THE LAW IF THERE WERE NO SUCH DECISION AND THE CASE HERE WAS ONE OF FIRST IMPRESSION.

This is so for the following reasons among others:

It is settled that a prohibition of "knowingly causing to be delivered" is a prohibition against starting machinery. Mailing the letter is the only starting delivery that this defendant could do. He mailed in Sioux City, therefore he caused delivery in Sioux City and South Dakota has no jurisdiction.

Congress has construed that "causing" does not create elective venue because when using "causing to be delivered" and the like, it has invariably added an express provision for elective venue.

It is the universal interpretation that causing does not give such venue because all but one case in a hundred have been instituted in the district of mailing. The same result is reached by the universal current of decision since "causing to be delivered" was added to the statute—that the mailing still remains the gist of the offense.

IV.

THE UNCONTRADICTED TESTIMONY THAT ACCUSED WAS NEVER IN SOUTH DAKOTA AT ANY MATERIAL TIME AND THE LINE OF DECISION ABOVE REFERRED TO ARE NOT OBTAIATED BY THE CONTINUOUS OFFENSE STATUTE. SECTION 731. THIS IS SO BECAUSE

Mailing being the completed offense and the only "causing of delivery" that is possible there can be no room for Section 731 because an act completed in one district can not be further completed in another.

The Circuit Court of Appeals in the Fifth Circuit ruled in the case of Whitehead, 245 Fed. at 388 that a violation of Section 215 as now amended is complete when the letter is mailed with the proper address and stamp, even if it never reaches the addressee.

This court has covered this point by a line of express decisions. (Original brief, 52 and 52, bottom.)

If Section 731 applied, the Stever case could not have been decided as it was.

This court has held that for practical purposes as to jurisdiction, it will not do to say that with few exceptions every crime has continuity.

There should be no confusion between a completed act and the injurious consequences of an injurious act. If a seduction be completed in one state prosecution must be had there and can not be had in another where the birth occurs.

Cases like that of *Palliser* have no application. In the first place they are not misuse of the mails cases and therefore do not run counter to the express de-

cision that mailing is not a continuous offense. The *Palliser* case but rules, and rightly, that where the accusation is an attempt to bribe the mere mailing of the letter offering the bribe is not a completed offense; that it is not completed until the addressee is, by means of delivery, advised that it is sought to bribe him. That has no bearing on whether the offense of using the mails in aid of a fraudulent scheme is or is not completed when the mailing is completed.

V.

THERE SHOULD BE NO REMOVAL WHERE THE INDICTMENT OMITTS ANY ESSEN- TIALS OF THE OFFENSE.

That is Hornbook law. That question can never be relegated to the trial court. In this case one essential element is omitted, to wit: the value of the shares. The scheme alleged is to obtain money for those shares by false promises, representation, etc. It is Hornbook law that intent to defraud is essential. A failure to say anything about the value of the shares or to assert that they were not worth as much as was obtained for them leaves out the vital element of intent to defraud. See *Hess*, 142 U. S. 483; and pp. 104, 105 Original Brief. See also *United States vs. Johnston*, 292 Fed. 491. (A removal case.)

VI.

RESPONDENT DOES NOTHING WITH DIVISION JURISDICTION NOR WITH THE QUESTION OF WHETHER THE LETTERS ARE AN EXECUTION OR ATTEMPTED EXECUTION OF THE SCHEME ALLEGED.

Not a word is said about the Post case or Paul vs. Virginia. Not a word about Section 53, Judicial Code. Not a word about transfer on the application of the Government.

Not a word has been said either in oral argument or in brief as to the fact that the letters said to be in execution or attempted execution of the alleged scheme show on their face that they are addressed to those who had already been defrauded, if ever defrauded.

VII.

NO ADJUDICATION IS PLEADED AND THE PLEA WOULD BE UNTENABLE IF MADE. WHERE A HABEAS CORPUS PROCEEDING ENDS IN A REMAND THERE IS NO ADJUDICATION AND NO BAR TO HAVING SUCCESSIVE APPLICATIONS HEARD.

That such applications are entitled to be heard independently of the decisions in former applications, is settled in the Law of England, and that law rules in the Federal courts. See *Ex Parte Kaine* per Justice Nelson. (See pp. 15, 16, brief in 705.) In that case the first application had been denied, and the claim was made that the first decision was final because it had been made by Judge Betts sitting in the Circuit Court and that same was a court of competent jurisdiction to hear and determine whether the commit-

ment order or warrant was legal or not. (P. 15, brief in 705.) Justice Nelson held against this contention.

In *Ex Parte Cuddy*, per Justice Field, 40 Fed. at 65, 66, it is said:

“The writ of habeas corpus it is true is the writ of freedom and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice in the Kingdom having the right to grant such writ. No appeal or writ of error was allowed from a judgment refusing a writ of habeas corpus; nor, indeed, could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of *res adjudicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted.” *Ex Parte Kaine*, 3rd Blatchf. 5, and cases there cited.

The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions there the doctrine prevails now. In many instances great abuses have attended this privilege which have led some of the states to legislate on the subject. And, in the absence of such legislation, while the doctrine of *res adjudicata* does not apply, it is held that the officers before whom the second application is made may take into consideration the fact that a previous application has been made to other officers and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of court or officer to whom the first application was made and the fullness of the consideration given to it. I hardly think that an ordinary justice would feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall or Chief Justice

Taney, who had refused an application for a writ after full consideration.”

The fair analysis of the foregoing is that the most which the first decision can accomplish is the creation of a precedent which might be highly persuasive or otherwise according to the standing of the decider and the character of the decision. Next, it served notice on Congress as early as August 13, 1889, that if the possible abuses were not to continue it was up to Congress to enact some statute law. It is within reasonable bounds to say that the decisions by Mr. Justice Nelson and Mr. Justice Field and the other cases we have cited have higher standing here than the decision in the Fifth Circuit, that the first decision is final. Surely, neither the decision in the Second or in the Fifth Circuit are persuasive precedents. This is emphasized by the fact that what these two first named decisions hold has been followed in Carter's case, 105 Fed. 614; in the case of Kopel, 148 Fed. 505, and by the courts of last resort in Maine, Massachusetts, Minnesota, Missouri, New York, North Dakota and Kentucky—to say nothing of the decisions in England and the one in British Columbia. We have many cases of this character in our brief in 705. (See pp. 15-23.) Many of them supplement the notice given Congress which is found in the Cuddy case. They declare that if a change is to be made it must be done by statute. In the case of Kopel, 148 Fed. 506; decided October 10, 1906, attention is called to the fact that no Federal statute has been passed limiting the common law right to successively petition every judge having authority “without regard to the fate of the successive applications,” wherefore the court considered itself bound

“to dispose of the matter as an original application.” And Congress has enacted no statute.

Speaking to such a situation Judge Bingham pertinently said in the *Graves* case, 270 Fed. at 187, “and until Congress takes such action (stopping the abuse of appeals in habeas corpus cases) the court should enforce the statutes as they stand without undertaking to limit them by judicial construction.”

As to the materiality of the right to appeals and as to the finality of decisions in the Circuit Court of Appeals. Both questions are involved in the *Carter* case heard before Thayer and Hook, Judges. In that case *Carter* had gone into this very Second Circuit. Being remanded, he appealed to the Circuit Court of Appeals of that Circuit. The decision below being there affirmed, he sought review here by certiorari, and the application was denied. He went beyond that and took an appeal here, which appeal was dismissed on the ground there could not be an independent appeal both in the Circuit Court of Appeals and in this court (105 Fed. at 616).

Certainly this settles that what occurred in the Second Circuit was no bar to the application made in the Eighth Circuit. And the holding is that the denial of the writ by the Federal courts of one circuit does not render the questions determined *res adjudicata* so as to preclude for reexamination by courts of another circuit of subsequent habeas corpus proceedings instituted therein by the same petitioner. (105 Fed. at 614.) It settles also that the right to appeal does not destroy the right to independent consideration on successive applications. For in the *Carter* case the right to appeal existed and, not only that, but it was exercised by going to the Circuit Court

of Appeals for the Second Circuit. That very question arose in the case of *Bowack* and was decided there squarely (2 B. C. at 223, 224). It was held that though the right of appeal was given that was not an exclusion, and that *Bowack* was still entitled to use the common law right of having successive applications independently heard. (See page 22 brief in 705.)

We believe no case that counters those we have cited exists. The Government asserts but one and that is the case of *Watkins* in 3rd Peters 193. An examination of that case shows that it is irrelevant to the point now in consideration. About all that makes it relevant is that it is a decision in a habeas corpus application. There were no successive applications and consequently the case does not deal with the effect of the first decision. What the *Watkins* case is is just this: *Watkins* was under conviction in a Federal court. He applied to this court for habeas corpus. The writ was denied because it was rightly held that since this court could not review the conviction by appeal or writ of error it should not do so by habeas corpus since the conviction was the action of a competent court, and since the English law expressly excepted such convictions from being dealt with in habeas corpus.

Indeed respondent make no serious attempt to meet this overwhelming array of case law. The most that is said in addition to citing the *Watkins* case is found on page 15 of his brief and is, that as to the claim that a discharge in habeas corpus is not *res adjudicata* so as to prevent another application for the writ, that "in a general way this may be true." At this point nothing is added except the immaterial statement that

the fundamental principle of *res adjudicata* applies in criminal cases, which is irrelevant because habeas corpus is a civil case—see the Graves case 278 Fed. There is the further immaterial statement that a *discharge* in habeas corpus may operate as *res adjudicata*. Of course it may. But the distinction on this head between a discharge and a remand is elementary. And then there is the further statement that though there may not be *res adjudicata* here, yet the action in the Second Circuit should operate “as the law of the case.” This is making a distinction by giving the same thing two names. The rule that the remand does not constitute *res adjudicata* would mean little if a remand barred successive applications merely by being called “law of the case.”

It may well be added here that respondent concedes that remands in habeas corpus will not prevent the accused from setting up in the trial court the very points decided by the remand. The opinion in the Fifth Circuit so says. It is obvious therefore that the remand can not be treated as an adjudication, for an adjudication bars a reassertion in any and all courts including the South Dakota court in which this indictment was returned. Wherefore, a concession that those points may be again raised in South Dakota is a confession that the action of the courts in the Second and Fifth Circuits are not an adjudication. This explains the case law and gives it the support of reason. It is not a question whether the court that decided the first application is one whose judgments are ordinarily final, not a question of the court but of the nature of the litigation. That is interlocutory, not final. From top to bottom it is just the action of a committing magistrate. Tinsley 205 U. S. 20; Blaf-

fer (C.C.A.) 160 Fed. 389; Howe 9 Mo. 690; Ex Parte Johnson (Okla.) 98 Pac. at 464; Snyder 17 Kan. 552; Clarke (Mo.) 106 S. W. at 996; Ex Parte Johnson (Okla.) 98 Pac. at 465; Pratt 279 Fed. at 265; Henry 123 U. S. 373.

It is not the ordinary case or cause, because in it the pleading of the plaintiff, the indictment, is admissible in evidence. Certainly it is not admissible in any case in which the decision constitutes *res adjudicata*.

It is not a proceeding in a suit but a summary application. Cox 15 App. (CAS.) at 514, 515; Ex Parte Johnson (Okla.) 98 Pac. at 465.

It will hardly be contended a remand would in suit on bail bond be available as an estoppel by point litigated. This, because the proceeding is summary and interlocutory. On the other hand, were it held in suit on one bond, never so erroneously, that this indictment is valid, that would be such estoppel. This, because action on the bond constitutes a cause or suit.

Think of what it would mean if a remand ordering trial where there is no jurisdiction of the subject matter were treated as a finality against repetition. When it is clear the trial to be had must be a farce, is it not far better to permit the taking a second chance to prevent such a farce by stopping it summarily than to wait and nullify the farce.

Another objection to the assertion of *res adjudicata* is, first, that the parties are not identical. (See the

case of Bradley 153 Mass. where that question is touched upon but not decided.)

Neither is there identity of issues. First, because in New York the conclusion of the indictment that an offense was committed in South Dakota was not met by testimony. In Louisiana it was met by undisputed testimony that accused was never in South Dakota at any material time. Next, the assignment of errors presented in New York does not raise the constitutional question that the indictment is in such condition as that it violates the constitutional requirement that the accused shall be advised of the nature of the offense with which he is charged. (See 81 to 85-342.)

Why should there be the circuitry of action that would result if this court declines to pass upon the merits on some theory like that of—say, adjudication. What useful purpose would be served? It is conceded these substantial points may be raised in the trial court. It is practically conceded that its decision is reviewable here on direct appeal. If the court thinks there is no jurisdiction in South Dakota, why not say so now. Why subject to a trial in a court that has no jurisdiction in order to decide after conviction what may now as effectively prevent a conviction as would a reversal of it. Why subject to the hardship of a removal to a distant place and to trial among strangers. Concede the court that is without jurisdiction will be fair. Surely the same presumption must be indulged for courts that do possess jurisdiction.

VIII.

THERE IS NO ABUSE OF PROCESS BECAUSE ONE SUCCESSIVE APPLICATION WAS MADE.

To begin with this is an affirmative defense and it is not pleaded. Passing that, if there be the right to make successive application, it cannot be a wrong to make just one. If that be a wrong, then the rule permits, but a single use of the permission cancels the permission. The authorities make clear that it would do more harm to deny successive writs than is ever done by any possible use of them. See the case of Snell 31 Minn. 110; Graves 270 Fed. 187; and see page 32 of brief in 705).

Whether that would make any difference or not, here, is no case of persistent application for successive writs. There was but one such application. As respondent says all done in New Orleans was just three phases in the one proceeding. There is no occasion for the fear that the decision of this court on the merits might also be disregarded and another application made. The right to successive writs has the exception that application is not to be made against the "holding of a court of superior jurisdiction." Clarke (Mo.) 106 S. W. at 996. It would be idle to apply to another court after this court had sustained removal, for appeal here would undo all that, and no court would grant the writ against such holding by this court.

IX.

THE THEORY THAT THE PROCEEDINGS IN LOUISIANA WERE BUT A CONTINUATION OF THOSE IN NEW YORK AND BASED ON THE WARRANT OF ISSUE OF REMOVAL IN NEW YORK, IS UNTENABLE AND IS NOT SUSTAINED BY THE RECORD.

FIRST.—The appearance bond given in New York in lieu of removal ended the warrant of removal. After that it ceased to function anywhere.

Second.—A warrant of removal in one district cannot be the basis of removal proceedings in another. The basis must be either indictment, bench warrant or complaint.

Third.—Under the rule that what is enumerated excludes that which is not enumerated, the Louisiana proceedings are not based on the New York warrant. The return of the respondent shows affirmatively that the detention was upon commitment and other orders made by the Louisiana Commissioner and the judge of the Louisiana District Court. (pp. 1, 5-341; pp. 1, 6-342; pp. 9, 10, 14-705.)

Assuming for the sake of present argument that the Louisiana proceedings could be based upon the proceedings that had been had in New York, it is a conclusive answer that they were not so based. After the authorities in South Dakota were advised of the surrender, a bench warrant was moved in the South Dakota District Court and one issued on the 4th of April. (pp. 90, 91, 92-342.) Return was made on the same day that this appellant was not found within this district. (p. 93-342.) Two days later an Assistant District Attorney made complaint under Section 1014.

It was on this complaint that the Commissioner had a hearing and held appellant for removal. And the complaint is in terms based upon this single indictment in the District of South Dakota. (pp. 100, 101-342.)

Finally—this all is but a repetition of the *res judicata* argument—but a way of saying that the action of the New York Court bars successive application. In all the cases that present such application a removal had been ordered in the earlier application. That is why the later application was made.

X.

THERE WAS SUFFICIENT CUSTODY TO BASE HABEAS CORPUS.

Some claim is made that this is not so in case 341. The basis for the claim is that the return is not traversed. It asserts that the surrender was voluntary and urged by the accused against the argument of the deputy marshal, and that after the voluntary surrender there was in fact nothing but a short and nominal custody. Let us assume that the return does make this claim and that if nothing more subsisted the assertion would stand because not traversed. The trouble is traverse is unnecessary. The Government put the deputy marshal on the witness stand. He said nothing about any voluntary surrender or argument about it. He deposed that there was actual custody and that it was not relieved from until the deputy satisfied himself that writ of habeas corpus had issued and that appearance bond therein had been given as required by the judge. He added that there would

have been custody without the surrender upon advices received from South Dakota. (pp. 43, 44-341.)

But suppose there was not such custody in 341 as will base the application. There are three cases here. Each presents the same substantial questions. If there was sufficient custody in either of the three, the basis for habeas corpus is furnished. Appellant does not need a decision in each and all of the three cases before this court. Now, as to case 342, there is no pretense that there was not actual custody. Appellant was taken into custody upon a final mittimus after hearing was had by the Commissioner on complaint filed under 1014. (pp. 94, 95-342.) The return admits there was actual custody. (pp. 1, 6-342). The respondent admits actual arrest and custody. (p. 7.) Of course it cannot be claimed there was not actual custody in 705. There, it continued until relieved against by the supersedeas of the Circuit Court of Appeals.

XI.

NEITHER THE GIVING OF BAIL BONDS, NOR THEIR FORFEITURE, NOR ANYTHING ELSE THAT APPELLANT COULD DO OR FAIL TO DO, CAN GIVE JURISDICTION TO THE DISTRICT OF SOUTH DAKOTA IF IT LACKS IT.

Respondent admits that if jurisdiction is lacking and therefore the indictment is an absolute nullity, the bail bond would be a nullity and could not of course effect a waiver. But at this point respondent reasons in a circle and says the indictment is not void because the New York courts held that it was a proper basis for a removal. If that is not an

adjudication, the indictment is now before this court. Assuming that there was no jurisdiction in South Dakota, the bonds given are waste paper (original brief in 705—33, 34).

Without any exhaustive discussion of the case of Peckman 143 Fed. 625, it suffices to say that in that case no jurisdictional question is involved. It therefore is not a holding that lack of jurisdiction can be waived. Speaking to that elementary proposition, we have but to say that giving of bonds, causing them to be forfeited or anything else appellant could have done, will not avail to bar him. He could not give South Dakota jurisdiction by the most solemn and express consent. In the case of Conner 111, Fed. 734, it was ruled:

“There can be no order of removal upon consent of the party whose removal is sought where the facts charged in the indictment do not constitute a claim.”

The objection that there is no jurisdiction of the offense “cannot be waived and may be taken at any time.” 16 Corpus Juris 184; Gilmer 129 U. S. 315. In the case of the Indians decided by Judge Dillon on Circuit (27 Fed. Cas. 923), he discharged because the court had no jurisdiction although the accused expressly waived motion in arrest of judgment and asked to be sentenced.

If express consent can not give the necessary jurisdiction certainly it can not be given by estoppel or implication.

XII.

Respondent says nothing about division line jurisdiction (see original brief in 341—34-59-63). Nor about transfer on application of the Government (original brief in 341—81-85). Nor about the letters not being acts in execution of the scheme (original brief 341, 342—86-102).

Respectfully submitted,

B. I. SALINGER,
Attorney for Appellant.

ST. CLAIR ADAMS,
L. H. SALINGER,
On Brief.



341, 342, 705.

ADDENDUM.

(This was omitted through oversight in sending copy to printer.)

I.

The undisputed testimony that accused was at no material time in South Dakota, and the continuous offense statute.—Hence discharge for want of probable cause. *Pereless*, 157 Fed. at 421, orig. brief, 50.

(a) There is no conspiracy count.

(b) The mailing of a letter is not a continuous offense—*Palliser's* case is not relevant. Mailing gets into it only as being the first step in an attempt to bribe. Of course in such a case the mailing did not complete that offense. That has no bearing on the question whether mailing in violation of Section 215 (mailing being the gist of the offense) is completed when the mailing is done. That it is the gist of the offense is universally held. (Original brief, 52.)

In the *Whitehead* case (5th Circuit), 245 Fed. at 388, it is ruled that the mailing so utterly completes the offense that it is immaterial that the letter never reaches the addressee.

It has been expressly decided in this court and elsewhere that mailing is not a continuous offense. (Original brief, 52, 53.) It is legislative construction that it does not constitute such offense. (Original brief, 57.) It is the inevitable implication in the *Stever* case that mailing is not a continuous offense. It is settled that an offense is not the less completed because its injurious consequences occur elsewhere and later. (Orig. Brief, 53-54.)

II.

Causing delivery-venue.

Mailing is not a continuous offense. First, because the mailing itself completed the offense. Second, because the thing prohibited is not delivery but causing delivery. This use of "causing" as a verb is merely the starting of the machinery that brings about delivery. (Original brief, 31.) Third, the only causing one not an employee of the establishment can do is mailing, and as the indictment here charges the mailing to have been done in Iowa there is no jurisdiction in South Dakota. This, because the only act of causation was done and completed in Iowa. As well say that under a statute punishing the firing of a shot with intent to kill, prosecution will lie in a district where no shot is fired.

Nothing in the cases cited by the respondent in the least affect all this. There are three for which it is claimed that by implication at least they give venue to South Dakota. Two of them, *Brown vs. Elliott*, 225 U. S. 392, and *Hyde vs. United States*, 225 at 347, are conspiracy cases, and the point ruled is that physical absence of some conspirator is immaterial so long as a partner in the conspiracy committed an overt act within a district wherein an indictment is returned. (Here is no charge of conspiracy.) The third is *Benson vs. Henkel*, 198 U. S. 7, wherein it is said:

"We have had frequent occasion to hold generally that technical objections should not be considered and that the legal sufficiency of the indictment is only to be determined by the court in which it is found. Indeed it is scarcely seeming for a committing magistrate to examine closely into the

validity of an indictment found in a Federal Court of another district and such to be passed upon by such court on demurrer or otherwise. Of course this rule has its limitations. If the indictment were * * * one that obviously upon inspection set forth no crime against the United States * * * or if such crime be charged to have been committed in another district from that to which the extradition is sought,—the Commissioner could not properly consider it as ground for removal. In such case other evidence must be had as to probable cause."

III.

The Stallings case 253 U. S.

It holds just three things. First, that the bond given in Stallings case was absolutely voluntary. Second, that an appeal testing the right to remove is under such circumstances moot. Third, that being under bail is not the custody which will base an application for habeas corpus. All this is made clear not only by what the decision says but by its citations.

That the bond in the *Stallings* case was absolutely voluntary is fully pointed out on pp. 340, 341, 343 of the report of its decision. That in the case at bar the bond was not given voluntarily is demonstrated by the fact that it was conceded it was given "in lieu and substitution for his removal by the marshal." (Pp. 8-342.)

Of course an involuntarily given bond to appear in a court that has no jurisdiction cannot be a waiver of anything. Such a bond is a piece of waste paper. (Original brief, 705, 36, 40.)

In the Stallings case no question of venue jurisdiction is involved. Its next holding is that where a bond is given voluntarily a test of the right to remove is a

moot question. (Report of Stallings Decision, pp. 343, 344, and the citation of Moy, 113 U. S. 216; Baez, 177 U. S. 378.)

The last point of the Stallings decision is that one who is under bond is not in such custody as that it will base habeas corpus. That is made plain by what is said and also by the citations. Those citations are *State vs. Buyek*, 1 Brev. 460 (S. C.); *Arnold*, 3rd Yeates (Pa.), 6, *Martin*, 569 (La.); *Troutman*, 24 N. J. L. 634, *Silbray*, (CCA) 185 Fed. 401.

There is no question in the case at bar about actual custody in at least two of the cases before this court. (P. 26 Reply.)

At any rate, there is no plea of waiver.

IV.

The Peckham case, 143 Fed. 625.

It seems to have very little to do with the controversy at bar, even if it were to be followed in a holding that jurisdiction could be waived by giving a bail bond—in which connection it should be said that no waiver is pleaded; and there is no venue jurisdiction in the case.

Its main argument that bail giving could cause delay. Successive writs being permitted, one in custody could cause just as much delay. Again, as abuse of the writ is not pleaded, there was no chance to explain, including the giving of bond by the company who had surrendered.

In the *Peckham* case an examination before the magistrate proceeded for a time. Peckham concluded to waive examination and the proceeding before the Commissioner stopped with the giving of an appearance bond on the part of Peckham. It will be noticed that the bond was given voluntarily. When given, the voluntary act of Peckham brought about a situation under which it could not be told whether removal would ever have been ordered had he not waived the examination. No question of jurisdiction as to the place where the alleged offense was triable is raised or considered in this case. Neither are successive applications for habeas corpus mooted in any way because there never were any such applications. The crucial question, as stated by the trial judge, is whether one may have the first writ of habeas corpus after he has "voluntarily surrendered himself to the sheriff," and the decision is that he is not under those circumstances entitled to that writ. The case has so little to do with what will waive the right to successive applications, that, as it points out as an argument against Peckham, instead of testing the action of the committing magistrate by habeas corpus, he permitted that action to become a finality by failure to sue out a habeas corpus. Any examination of the Peckham case demonstrates that it amounts to just this, even if it were to be followed:

Where one voluntarily gives a bond and is afterward surrendered by his sureties, he can not hark back to where he stood before he gave bond and demand a new examination by a committing magistrate to supplement the one had in the first place, and which was left uncompleted by a voluntary waiver of further examination.

It should be said, too, that in the Peckham case the Commissioner acted in New York, the bond was given in New York, the surrender was made in New York, and the attempt to get a new preliminary examination was made in that state. If by any stretch of the imagination the Peckham case is applicable anywhere it would be if this appellant had sought to do in New York what Peckham attempted to do there. The surrender at bar was outside the jurisdiction of New York. If it be granted for the sake of argument that he could not test the commitment upon that surrender because he had given the bond under which surrender was made, still nothing stands in the way of testing his detention under an independent removal proceeding brought after commitment on the surrender by means of an information lodged by the Government, not because of anything that had happened in New York, but because after exoneration of the bond through surrender, the Dakota court ordered a forfeiture and issued a new bench warrant.

In fewer words, appellant has brought before this court three cases and, beyond all argument, the detention complained of in two out of the three is actual custody and not detention by reason of the surrender.

Respectfully submitted,

B. I. SALINGER,
Attorney for Appellant.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 342

B. I. SALINGER, JR., APPELLANT,

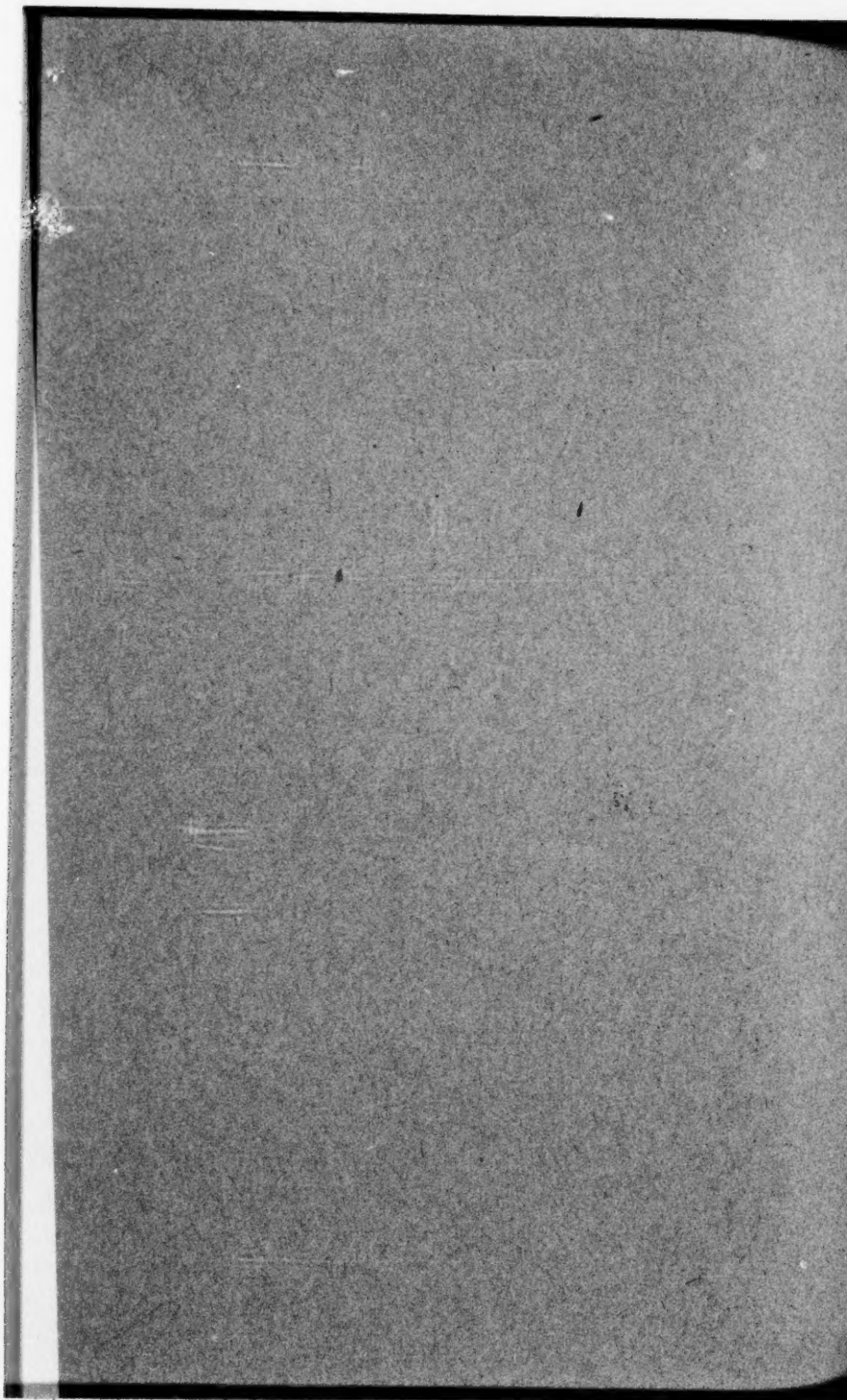
vs.

**VICTOR LOISEL, UNITED STATES MARSHAL FOR THE
EASTERN DISTRICT OF LOUISIANA**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA**

FILED MAY 24, 1923

(39,647)



(29,647)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 342

B. I. SALINGER, JR., APPELLANT,

vs.

VICTOR LOISEL, UNITED STATES MARSHAL FOR THE
EASTERN DISTRICT OF LOUISIANA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA

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[fol. 1] UNITED STATES OF AMERICA:

**DISTRICT COURT OF THE UNITED STATES, EASTERN
DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION**

No. 17238

UNITED STATES ex Rel. B. I. SALINGER, JR.,

versus

VICTOR LOISEL, United States Marshal

Appearances: St. Clair Adams, Esq., Attorney for B. I. Salinger, Jr., Appellant; Louis P. Bryant, Jr., Esq., Assistant United States Attorney for the Eastern District of Louisiana; S. W. Clark, U. S. Attorney for the District of South Dakota, attorneys for Victor Loisel, United States Marshal, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, to the Supreme Court of the United States, Returnable within 30 Days from April 27, 1923, at the City of Washington, D. C.

[fol. 2] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF LOUISIANA

No. 17238

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed April 18th, 1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The Petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa, and is a citizen of said State and of the United States of America.

2. That petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of Victor Loisel, Esquire, United States Marshal in and for the Eastern District of Louisiana, to-wit: at the City of New Orleans in the said District.

3. That the sole claim and the sole authority by virtue of which the said Victor Loisel, Marshal as aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a commitment, in writing, a copy of which is hereunto annexed and marked for identification herewith Petitioner's Exhibit "A."

4. That, upon information and belief, the said commitment was issued by Arthur H. Brown, Esquire, United States Commissioner, by virtue of a certain indictment found against petitioner in the proceeding entitled "United States versus B. I. Salinger, Jr., No. 983 W. D., in the District Court of the United States for the District of [fol. 3] South Dakota, Western Division," charging petitioner with the violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto annexed as part hereof and for identification herewith marked "Petitioner's Exhibit B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him (and as to them he cannot say for he has not been permitted any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa, for he was never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one, nor at the time of nor since the return of said indictment.

6. That said indictment is void and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

[fol. 4] (a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

(d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution or fur-

therance of any scheme to defraud because the indictment and said letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, [fol. 5] such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section two or Article Three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any [fol. 6] event, has no power — direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention, removal or trial under said indictment, or by virtue of any process thereunder, would be in violation of the Fifth and Sixth Amendments to and of Section Two of Article Three of the Constitution of the United States.

7. That petitioner shows further that no motion has ever been made by him or for him with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District and without his motion or consent, the said indictment and all proceedings thereunder, were upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South Dakota, transferred to that last named Division, and that petitioner's

detention for and removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

8. Upon information and belief, the said commitment is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the statutes of the United States, and will, if the writ herein prayed for be not granted, be under color of said void indictment and commitment, removed [fol. 7] to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within the said District of South Dakota.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue directed to the said Arthur H. Brown, Esquire, United States Commissioner for the Eastern District of Louisiana directing him to certify to this Court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings which resulted in the issue of the said commitment; and that this Court may proceed in the summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the eighteenth day of April, A. D. 1923.

(Signed) St. Clair Adams, Attorney for Petitioner.

[fol. 8] Affidavit to above paper omitted in printing.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF
LOUISIANA

ORDER ISSUING WRIT OF HABEAS CORPUS

Now on this eighteenth day of April, A. D. 1923, the above matter coming on upon the petition for the issuance of a writ of habeas corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this Court at 11 o'clock A. M. of

the 20th day of April, A. D. 1923; and the petitioner is hereby admitted to bail pending said hearing in the sum of Fifteen Thousand 00/100 Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the Court may from time to time direct; and it is hereby further ordered that writ of certiorari issue herein, directed to Arthur H. Brown, Esquire, United States Commissioner for the Eastern District of Louisiana, directing him to certify to this Court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings which resulted in the issuance of the said commitment, returnable to and before this Court at 11 o'clock A. M. of the 20th day of April, A. D. 1923.

By the Court.

(Signed) Rufus E. Foster, Judge.

[fol. 9] EXHIBIT FOR PETITION: FINAL MITTIMUS—Filed Apr. 18, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the Keeper of the House of Detention in the city of New Orleans, Greeting:

Whereas, Ben J. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May, 1923, in said District, in violation of Sec. 215 CC. of the United States, unlawfully use the mails with a scheme to defraud;

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben J. Salinger, Jr., committed said offense as charged, I have directed that said Ben J. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana on the 20 day of April, 1923, and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben J. Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you, the Keeper of said Jail of said City, to receive the said Ben J. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

Witness whereof, I have hereto set my hand and seal at my office in said District this 18 day of April A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

[fol. 10] UNITED STATES DISTRICT — OF LOUISIANA, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

[Title omitted]

ANSWER AND RETURN TO PETITION AND WRIT FOR HABEAS CORPUS—
Filed April 20, 1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division:

Now into court comes Victor Loisel, United States Marshal for the Eastern District of Louisiana, the defendant herein, through L. P. Bryant, Jr., Assistant United States Attorney, and for answer to Plaintiff's petition says:

I. For lack of sufficient information to justify a belief, Respondent accordingly denies the allegations of fact contained in Article I of Plaintiff's petition.

II. Respondent admits that petitioner has heretofore been actually imprisoned and restrained of his liberty, as set forth in Article II of Plaintiff's petition, but Respondent shows that petitioner is now at liberty under bond.

III. For answer to Article III, Respondent adopts as his answer, his answer to Article II of Plaintiff's petition.

IV. Respondent admits the allegations of fact contained in Article IV of Plaintiff's petition.

[fol. 11] V. Respondent denies the allegations of fact contained in Article V of Plaintiff's petition.

VI. Answering Article VI of Plaintiff's petition and the sub-sections a, b, c, d, e, f and g thereof, Respondent denies all the allegations of fact therein contained.

VII. Respondent admits that the indictment was found by a Grand Jury in the Western Division of the District of South Dakota, and thereafter, by order of the Court, the place of trial set for the Southern Division of said District of South Dakota, but that said order of Court, was made in open court and in the presence of attorneys representing petitioner herein.

Respondent denies all other allegations contained in Article VII of Plaintiff's petition.

VIII. Respondent denies all the allegations of fact contained in Article VIII of Plaintiff's petition.

Now for further answer and return to the writ, herein Respondent shows:

That petitioner herein was indicted by a Grand Jury of the United States, drawn from the body of the District of South Dakota,

at a term of court for said district held at the City of Deadwood within the Western Division of said District, on the third Tuesday of May, 1922; that a bench warrant was thereafter issued by the Judge of the District Court for the District of South Dakota, under the seal of said court, and placed in the hands of the Marshal for service upon the petitioner within the Southern District of California, [fol. 12] but that petitioner escaped from said Southern District of California before said bench warrant could be served and came to the Northern District of Iowa, and there, on or about the 8th of June, 1922, surrendered to a Commissioner of said District for the Northern District of Iowa, and gave bond in the penal sum of \$10,000, for his appearance before the District Court for the District of South Dakota, at the opening day of the October term thereof, to be held at Sioux Falls on the third Tuesday of October, 1922; that after giving said bond petitioner was released from custody, and at the opening day of the term of the District Court in the District of South Dakota, held on the third Tuesday in October, 1922, defendant failed to appear as conditioned in said bond, and thereupon such proceedings were had; that said bond was forfeited and a bench warrant issued by the District Court for the Arrest of petitioner; that thereafter and on or about the 17th day of October, 1922, petitioner was arrested in the City of New York, in the Southern Division of New York, and removal proceedings were instituted seeking to remove the petitioner from the Southern District of New York to the District of South Dakota, for trial; that petitioner was regularly committed by a United States Commissioner for the Southern District of New York to the District Court for the Southern District of New York, for an order of removal; that thereupon, and on or about the 8th day of November, 1922, petitioner sued out a writ of habeas corpus from the District Court for the Southern District of New York, and such proceedings were had, that thereafter and on or about the 14th day of November, 1922, said writ of habeas corpus was quashed by the District Court for the Southern District of New York, and Petitioner remanded to the custody of the Marshal for the Southern District [fol. 13] of New York, for removal to the District of South Dakota, that appeal was taken by petitioner from said order of removals, *the* the Circuit Court of Appeals, for the Second Circuit, and such proceedings as thereafter had resulted in an affirmance of the order of removal granted by the District Court for the Southern District of New York and the Mandate was sent down from the Circuit Court of Appeals for the Second Circuit of the United States, to the District Court of the United States for the Southern District of New York, on the 14th day of March, 1922; that upon the receipt of said mandate the District Court for the Southern District of New York, on the 16th day of March, 1923, made its order of removal directing the Marshal of said District to transport the petitioner, B. I. Salinger Jr., to the District of South Dakota, and there place him in the custody of the United States Marshal for said District; that pending said appeal petitioner herein had been given liberty, under bond, in the penal sum of \$10,000, and upon the issuance of the order of removal as above set forth petitioner appeared before the District

Court for the Southern District of New York, and asked leave to give a bond conditioned for his appearance before the District Court of the District of South Dakota as in lieu and substitution for his removal by the Marshal; that the order of removal was made by Judge Augustus N. Hand, one of the Judges of the District Court for the Southern District of New York, but that the application of petitioner for a bond was made before Judge W. M. C. Van Fleet, one of the other Judges of said district, and thereupon, an order was made by the said Judge W. M. C. Van Fleet, that petitioner be permitted to give a bond in the penal sum of \$15,000, conditioned for [fol. 14] his appearance before the District Court for the District of South Dakota, for trial at the opening day of the April, 1923, term thereof, holden at Sioux Falls, within said District; that said order allowing petitioner to give bond for his appearance before the District Court of the District of South Dakota, is of date March 20th, 1923, and that thereupon, and in pursuance of said order petitioner herein gave a bond to the United States of America in the penal sum of \$15,000, wherein he signed as principal, and wherein the Southern Surety Co. of Des Moines, Iowa, a corporation, signed as surety, conditioned for the appearance of petitioner, herein, for trial in the District Court of the United States for the District of South Dakota, to be holden at the City of Sioux Falls in said District, on the first Tuesday of April, 1923, to-wit: the third day of April, 1923, at the hour of 10:00 a. m., upon the indictment filed in said District, which said bond was approved and filed on the said 20th day of March, 1923, and petitioner was thereupon allowed his liberty; that on the 31st day of March, 1923, petitioner herein and one Edward A. Parsons, an attorney-at-law, of the City of New Orleans, Louisiana, appeared at the office of Respondent, at the Federal Building in the City of New Orleans, and the said Edward A. Parsons, declaring himself to be an attorney of the Southern Surety Company of Des Moines, Iowa, introduced petitioner to a Deputy of Respondent as one B. I. Salinger, Jr., and stated that he desired to surrender petitioner to Respondent in behalf of his client, the said Southern Surety Company; that the said Parsons withdrew and the said Deputy stated to petitioner that he did not think he had any right to accept his surrender; that thereupon, petitioner stated to said Deputy that he [fol. 15] was a lawyer and protested that the surety had a right to surrender him to Respondent, and that any Marshal of any District of the United States had the right to accept the custody of a bonded party when he was surrendered by his bondsman even though the party-defendant had given bond to appear in a jurisdiction other than the one in which he might attempt to surrender himself; that notwithstanding the protest of Respondent the said petitioner insisted upon the right of his surety to surrender him in the manner and form aforesaid, and thereafter, a commitment was issued by Arthur H. Browne, United States Commissioner for the Eastern District of Louisiana, purporting to commit petitioner to the custody of Respondent by reason of his pretended surrender by his bondsman, and that almost immediately thereafter Respondent procured his release by giving bond for his appearance in the sum of \$5,000, and Re-

Respondent further states, upon information and belief, that petitioner never responded to the bond hereinbefore mentioned in the sum of \$15,000, conditioned for his appearance before the Court for trial at the City of Sioux Falls, South Dakota, on the 3rd day of April, 1923, or at any time thereafter; that on the 4th day of April, 1923, the Judge of the District Court for the District of South Dakota, entered its order forfeiting said bond and issued the bench warrant of said court for the arrest of petitioner, herein, and that ever since said 4th of April, 1923 said petitioner has been and is now a fugitive from justice; that on the 6th day of April, 1923, a verified complaint was filed with the United States Commissioner, Arthur H. Browne, wherein it appeared that an indictment had been returned by a Grand Jury for the District of South Dakota against petitioner [fol. 16] herein, at a term held in said District of South Dakota, on the 20th day of May, 1922, and that a bench warrant had been issued thereunder, and thereupon, the said Commissioner, Arthur H. Browne, issued his warrant of arrest for petitioner, herein, and under and by virtue of said warrant of arrest Respondent took the said petitioner into his custody at the City of New Orleans, Louisiana, and detained him for a few moments, only, during which time, petitioner gave bond for his appearance in the penal sum of \$15,000, and was released; that on the 18th day of April, 1923, a hearing was had before said United States Commissioner, at his office, in the City of New Orleans, Louisiana and such proceedings were had that said petitioner was held to answer to the District Court of the United States for the Eastern District of Louisiana, and the commitment issued in the form of copy of same attached to petitioner's petition herein; that Respondent received said commitment from the said Arthur H. Browne, United States Commissioner, as aforesaid, and took petitioner into his custody on the 18th day of April, 1923, at New Orleans, Louisiana, but that petitioner almost immediately thereafter gave bond in the sum of \$15,000, to appear before the District Court for the Eastern District of Louisiana, and that he is now at liberty, under bond; and Respondent shows that the only custody and detention of petitioner was as above set forth, and that he does not now have the custody of petitioner.

Wherefore: Respondent prays that the writ of habeas corpus herein may be dismissed and that the petitioner be dealt with as law and justice may require.

(Signed) L. P. Bryant, Jr., Assistant U. S. Attorney.

(Signed) S. W. Clark, U. S. Attorney for the District of South Dakota.

[fol. 17] Affidavit of Victor Loisel to above paper omitted in printing.

[fol. 18]

DEFENDANTS' EXHIBIT B

Motion for Transfer to District of South Dakota, Filed May 2, 1923

M-356-7

7. Application for Order of Transfer

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF SOUTH
DAKOTA, WESTERN DIVISION

No. 983, W. D.

THE UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

MOTION TO TRANSFER—Filed Oct. 17, 1922

Comes now S. W. Clark, the United States Attorney for the District of South Dakota, and respectfully shows unto the Court that the indictment in the above entitled cause was returned by a Grand Jury of the United States drawn from the body of the District at a Session of this Court held at the City of Deadwood, Lawrence County, South Dakota, within the Western Division, beginning on the third Tuesday in May, 1922; but that by the recitals in said indictment it appears that the acts complained of were committed within the Southern Division of the District of South Dakota, and that the trial and all further proceedings herein should be and — within the Southern Division of this District, and by reason thereof application is now made for an order of the Court transferring said cause from the Western Division of the District of South Dakota, to the Southern Division of said District, for all further proceedings herein.

Presented in open Court at Sioux Falls, South Dakota, this 17th day of October A. D. 1922.

(Signed) S. W. Clark, United States Attorney for the District of South Dakota.

[fol. 19] [File endorsement omitted.]

UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Sioux Falls, in said District this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk. (Seal of U. S. District Court, Dist. of South Dakota.)

DEFENDANTS' EXHIBIT B—Continued

UNITED STATES OF AMERICA,
District of South Dakota, ss:

JUDGE'S CERTIFICATE TO CLERK'S

I, James D. Elliott, Judge of the District — of the United States within and for the District aforementioned the same being a Court of Record, within and for the District aforesaid, do hereby certify, that Jerry Carleton, is Clerk of said Court, and was such Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk in in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D. 1922.

(Signed) Jas. D. Elliott, Judge of the District Court of the United States for the District of *of* South Dakota. (Seal of District Court of the United States for the District of South Dakota.)

[fol. 20] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States of America within and for the District aforesaid, do hereby certify, that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid,

duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District Court of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

[File endorsement omitted.]

[fol. 21] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States, for the Southern District of New York do hereby Certify that the writings annexed to this Certificate, namely Motion for transfer to District of South Dakota, filed December 27, 1922, in the case entitled: The United States of America vs. B. I. Salinger, Jr., et al., M-7-356, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this twenty-eighth day of March, in the year of our Lord One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

Alex Gilchrist, Jr., Clerk.

[fol. 22] EXHIBIT IN EVIDENCE: INDICTMENT—Filed March 31,
1923

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE DISTRICT OF SOUTH DAKOTA IN THE EIGHTH JUDICIAL CIRCUIT

At a stated term of the District Court of the United States of America for the Western Division of the District of South Dakota begun and held at the city of Deadwood, within and for the district and circuit aforesaid, on the third Tuesday of May in the year of our Lord one thousand nine hundred and twenty-two.

The Grand Jurors of the United States of America, good and lawful men, summoned from the body of the District aforesaid, then and

there being duly empanelled, sworn and charged by the court aforesaid to diligently inquire and true presentment make for said District of South Dakota, in the name and by the authority of the United States of America, upon their oaths, do present:

That Fred C. Sawyer, whose full first name is to the Grand Jurors unknown, C. H. Burlingame, whose full first name is to the Grand Jurors unknown, and B. I. Salinger, Jr., whose full first name is to the Grand Jurors unknown, hereinafter called defendants, at and about the month of November, 1917, the exact date being to the Grand Jurors unknown, did devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from the Midland Packing Company, a corporation thereafter to be created, A. L. Will, Frank Groesbeck, Thomas Mansheim, C. H. Halley, Martin Christensen, P. L. Peterson, Alfred Christensen, Will Hartman, G. A. Hegstrum, Theodore Anker, P. C. Peterson, W. M. Rowley, W. J. Shanard, Archie C. Jensen, and divers other persons whose names are to the Grand Jurors unknown (a class of persons residing within the United States of America, not susceptible, by reason of their great number and the lack of information on the part of the Grand Jurors, of being named herein, but comprising any and all persons whom the defendants could induce to purchase stock of said corporation, the persons so intended to be defrauded being hereinafter referred to as the victims or said victims), by inducing by fraudulent representations, pretenses and promises, and by fraudulent artifices and devices, said victims, as hereinafter more fully set forth, so intended to be defrauded, to part with their money and property in the purchase of shares of stock in the said Midland Packing Company, a corporation thereafter to be created, said scheme and artifice being more particularly set forth as follows:

That the defendants, on or about the 12th day of March, 1918, caused to be incorporated the Midland Packing Company, and that at all times from March 12, A. D. 1918, to May 7, A. D. 1920, the Midland Packing Company was a corporation organized and existing under and by virtue of the laws of the State of Iowa, and from March 12, 1918, to January 31, 1919, the authorized capital stock of the said Midland Packing Company was Three Million Five Hundred Thousand Dollars (\$3,500,000), consisting of twenty-five [fol. 23] thousand (25,000) shares of preferred stock of the par value of One Hundred Dollars (\$100) per share, and ten thousand (10,000) shares of common stock, of the par value of One Hundred Dollars (\$100) per share, and at all times from the first day of February, 1919, to the 7th day of May, 1920, the authorized capital stock of said Midland Packing Company was Eight Million Dollars (\$8,000,000), consisting of seventy thousand (70,000) shares of preferred stock of the par value of One Hundred Dollars (\$100) per share, and ten thousand (10,000) shares of common stock of the par value of One Hundred Dollars (\$100) per share;

That at all times from March 12, 1918, to May 7, 1920, the said Fred C. Sawyer was President of said Midland Packing Company, the said C. H. Burlingame was the Secretary and Treasurer of said

Midland Packing Company, and from March 23, 1918, to May 7, 1920, the said B. I. Salinger, Jr., was the Vice-President and General Counsel of the said Midland Packing Company; that the said Midland Packing Company will be hereinafter referred to as the corporation or said corporation; the said Fred C. Sawyer will be hereinafter referred to as Sawyer; the said C. H. Burlingame will be hereinafter referred to as Burlingame, and the said B. I. Salinger, Jr., will be hereinafter referred to as Salinger, and the said Sawyer, Burlingame and Salinger will be hereinafter referred to collectively as the defendants or said defendants;

That at all times from March 23 1918, to November 9, 1918, one H. M. Baine, whose full first name is to the Grand Jurors unknown, was a stock salesman and agent of the said corporation, sometimes referred to as director of finances; and from November 10, 1918, to May 7, 1920, one Tom G. Taylor, whose full first name is to the Grand Jurors unknown, was a stock salesman and agent of, and sometimes referred to as a director of finances of said corporation, and during the times aforesaid transacted business under the name and style of Tom G. Taylor & Company, or Tom G. Taylor & Co.; that the said H. M. Baine will be hereinafter referred to as Baine, and the said Tom G. Taylor will be hereinafter referred to as Taylor;

That heretofore, to-wit: On the dates and at and during the times hereinbefore specified, in the District of South Dakota and within the Southern Division thereof, and within the jurisdiction of this court, the said defendants, having heretofore devised, and intending to devise a scheme and artifice to defraud said corporation and said victims of its and their money and property in and by the various false and fraudulent pretenses, representations, promises, practices, artifices and devices as hereinafter more particularly set forth;

That is to say, that the defendants, at the times and with the intent and for the purpose as aforesaid, and as a part of the said scheme and artifice to defraud as aforesaid, caused the said Midland Packing Company to be incorporated as a part of said scheme, and caused the said Baine to enter into negotiations with Statter & Company, Packers, and H. Statter for the purchase of the property hereinafter described, and to be used in the manner as hereinafter stated; and having caused the said Baine to enter into an agreement with the said Statter & Company, Packers, and H. Statter for the purchase of the said property for the sum of Two Hundred Fifty Thousand Dollars (\$250,000) or thereabouts, the exact amount being to the Grand Jurors unknown, and intending to cause themselves to be elected as the officers of said corporation and to make use of their said positions for and in aid of the purposes hereinafter stated, and thereafter having caused themselves to be elected as such officers as hereinbefore stated, did, on or about the 18th day of June, A. D. 1918, the exact date being to the Grand Jurors unknown, cause to be issued to H. Statter forty-eight hundred fifty [fol. 24] four (4,854) shares of the capital stock of said corporation, as and for the ostensible and pretended consideration or purchase price to be paid to the said H. Statter and Statter & Com-

pany, Packers, a corporation organized under the laws of the State of South Dakota, for certain property referred to and described as the packing plant, assets and property of said Statter & Company, Packers, for the purchase of which said property the defendants had theretofore, on or about the 29th day of March, 1918, caused the said corporation to make and enter into an ostensible and pretended contract with said Statter & Company, Packers, in which said contract the consideration or purchase price for said property was fixed at Four Hundred Ninety-three Thousand Nine Hundred Dollars (\$493,900), and for the purchase of which said property the defendants had theretofore and as a part of said scheme and artifice to defraud, on or about November 6, 1917, the exact date being to the Grand Jurors unknown, caused the said Baine to negotiate and contract for as aforesaid for the said corporation, for a consideration of Two Hundred Fifty Thousand Dollars (\$250,000), and in connection with the issuance of the said forty-eight hundred fifty-four (4,854) shares of the capital stock of said corporation and as part of the said transaction, the defendants, pretending to act for said corporation, pretended to purchase from the said H. Statter twenty-two hundred fifty (2,250) shares of the said capital stock of said corporation, and in connection therewith caused to be assigned and transferred to the defendants and other persons whose names are to the Grand Jurors unknown, for the use and benefit of the defendants, of the said forty-eight hundred fifty-four (4,854) shares, twenty-three hundred fifty-four (2,354) shares, which said twenty-three hundred fifty-four (2,354) shares of stock the defendants thereafter caused to be sold as the stock and property of said corporation, for their own use and benefit; that the said ostensible and pretended issuance of the said forty-eight hundred fifty-four (4,854) shares of stock to the said H. Statter and the said pretended contract of purchase of the said property for the ostensible consideration of Four Hundred Ninety-three Thousand Nine Hundred Dollars (\$493,900) were colorable only and made with the intent to deceive and defraud the said corporation and victims;

That the defendants had theretofore, as a part of the said scheme and artifice to defraud, caused representations to be made to the Executive Council of the State of Iowa, under and in pursuance of the provisions of Chapter 71 of the Acts of the Thirty-second General Assembly of the State of Iowa, in connection with an application to the said Executive Council for authority to issue capital stock of said corporation in and for the ostensible purchase of the said property from the said Statter & Company, Packers, and H. Statter, and as a pretended appraisal of the said property, that the value of the said property and the price to be paid therefor by said corporation was Five Hundred Sixty-four Thousand Nine Hundred Dollars (\$564,900), and in reliance on such representations said Executive Council issued to the said corporation authority to issue its capital stock in the sum of Four Hundred Eighty-five Thousand, Four Hundred Dollars (\$485,400), subject to encumbrance against the same of Seventy-nine Thousand Dollars (\$79,000) or thereabout, in and for the purchase of the said property; that the defendants

caused the said forty-eight hundred fifty-four (4,854) shares of the capital stock of said corporation to be issued as aforesaid, as the ostensible and pretended consideration and purchase price of the said property from the said Statter & Company, Packers, and H. Statter, subject to said encumbrance, whereas they, the defendants, had in fact purchased the said property and caused the same to be purchased, for a consideration of Two Hundred Fifty Thousand Dollars (\$250,000), and caused said sum to be paid to the said Statter & Company, Packers, and H. Statter, therefor, in money, notes, bonds, certificates of deposit and capital stock of said corporation, the exact amounts, kinds and denominations being to the Grand Jurors unknown, and did thereby and in the manner and by the pretenses and devices aforesaid, cause to be issued of the capital stock of the said corporation, twenty-three hundred fifty-four (2,354) shares thereof, without any consideration to the said corporation, and for their own use and benefit; that the defendants did thereby and in the manner aforesaid, purchase the said property from the said Statter & Company, Packers, and H. Statter, and cause the same to be purchased for the said corporation, for a consideration of Two Hundred Fifty Thousand Dollars (\$250,000), which it caused to be paid for in the manner aforesaid, and caused the said forty-eight hundred fifty-four (4,854) shares of the capital stock of said corporation to be issued as and in the manner aforesaid, as a pretended consideration for the purchase of said property and to enable them, in the manner aforesaid, to convert and appropriate to their own use and benefit, the said twenty-three hundred fifty-four (2,354) shares of the capital stock of said corporation, without any consideration to the said corporation, and did thereby and in the manner aforesaid, convert and appropriate to their own use the said twenty-three hundred fifty-four (2,354) shares of the capital stock of the said corporation, in fraud of the said corporation and victims, and in pursuance of said scheme and artifice to defraud as heretofore set forth;

That as a further part of said scheme and artifice as aforesaid, the defendants on or about the 22d day of April, 1918, for the purpose of securing authority from the South Dakota State Securities Commission under the provisions of Chapter 319 of the Session Laws passed by the Legislative Assembly of the State of South Dakota in 1913, made and caused to be made to the said South Dakota State Securities Commission an application for authority to sell the capital stock of said corporation in the State of South Dakota, and in and as a part of the said application, they caused to be filed and presented a statement purporting to be a complete and correct statement of the assets and liabilities of said corporation, in and by which they stated and represented that the valuation of the said properties of said Statter & Company, Packers, had been presented to the Executive Council of the State of Iowa for valuation in compliance with the laws of the State of Iowa, and that the said Executive Council, after having fully canvassed and investigated the value of said property, had authorized the said corporation to issue Four Hundred Eighty-five Thousand Four Hundred Dollars (\$485,400) of its capital stock

for the payment of said property, and that the said corporation had been able by contract to make the purchase of said property for an amount totaling Four Hundred Fourteen Thousand Four Hundred Dollars (\$414,400), thereby making a net saving to the said corporation of Seventy-one Thousand Dollars (\$71,000) over the authorized valuation of said property by the said Executive Council of Iowa, thus reducing ultimately the promotion expenses of said corporation very materially, thereby intending by the said statements and representations to represent to and have the said South Dakota State Securities Commission believe and understand that the Executive Council of the State of Iowa had, in pursuance of law, fully canvassed and investigated the value of said property and authorized the said issue of Four Hundred Eighty-five Thousand Four Hundred Dollars (\$485,400) of its capital stock for the payment of said property as the true value thereof, and also representing and [fol. 26] intending to represent to the said South Dakota State Securities Commission, that the said corporation had been able to make the purchase of said property for an amount totaling Four Hundred Fourteen Thousand Four Hundred Dollars (\$414,400) and had thereby saved to the said corporation in said transaction, the sum of Seventy-one Thousand Dollars (\$71,000), over and above the authorized valuation of said property by the Executive Council of Iowa, and had thereby reduced the promotion expenses of said corporation in the sum of the said Seventy-one Thousand Dollars (\$71,000) whereas the defendants had, by and through the said Baine, as hereinbefore stated, purchased and caused to be purchased, the property aforesaid from the said Statter & Company, Packers, and H. Statter, for the sum of Two Hundred Fifty Thousand Dollars (\$250,000) or thereabouts, and that on or about May 7, 1918, by means of such statements and representations, the defendants, in the manner aforesaid, caused and induced said South Dakota State Securities Commission to issue authority to the said corporation to sell the capital stock of said corporation up to the amount of One Hundred Thousand Dollars (\$100,000) in the State of South Dakota, and thereafter, by means of the said statements and representations and other false and fraudulent statements and representations, the particulars of which are to the Grand Jurors unknown, the defendants did, on or about July 25, 1919, cause and induce the said South Dakota State Securities Commission to authorize said corporation to sell its capital stock in the State of South Dakota, up to the amount of Two Hundred Thousand Dollars (\$200,000); that by means of the authority so granted by the said South Dakota State Securities Commission, the defendants caused the capital stock of the said corporation to be sold, in the State of South Dakota, in and during the years 1918, 1919 and 1920, in an amount largely in excess of the sum of Two Hundred Thousand Dollars (\$200,000), by the means and in the manner as hereinafter set forth;

That as a further part of said scheme and artifice to defraud, the defendants, in and as a part thereof, caused an agreement to be entered into between the said corporation and the said Baine, bearing date March 23, 1918, in and by which the defendants caused the said

corporation to agree with the said Baine that he should have the exclusive right to sell all of the capital stock of said corporation at par, and the exclusive option to sell, in the event of an increase in the authorized capital stock of said corporation, all such increase in capital stock, upon the same terms and conditions as set forth in the said contract dated March 23, 1918, in connection with the then existing authorized capital stock of said corporation, which said contract was to provide and did provide, among other things, that at the time subscriptions for the agents, at least twenty-five per cent (25%) of the selling price of such capital stock of said corporation should be taken by said Baine for his stock should be collected in cash, and that promissory notes, payable to the said corporation, to become due not more than one year from the date of the subscription, might be taken for the balance of such subscription price, provided, however, that the said Baine should endeavor to secure as large a share of the said subscriptions in cash as possible, and the shortest possible maturing date on the said notes; that the said Baine would pay all the expenses of selling said stock, including compensation of salesmen and expense of providing and circulating sales literature and advertising, that the said Baine would devote his time to the sale of said stock until the same should be sold, and in the event of the acceptance by him of the sale of any stock of any increased capitalization of said corporation, that he would devote his time to the sale of such stock incident to such increased capitalization, and that as full compensation to the said Baine for the sale of said stock, the said corporation would pay him a sum equal to twenty per cent (20%) of the sale price of the stock sold by said Baine or his agents, which said twenty per cent was to be paid out of the initial payment received on such stock subscriptions;

That thereafter, on or about June 15, 1918, the exact date being to the Grand Jurors unknown, the defendants caused the said corporation to enter into a further agreement with the said Baine, which said agreement provided that in addition to the flat commission of twenty per cent (20%) provided for in the said contract dated March 23, 1918, for all stock of said corporation sold by said Baine to persons resident elsewhere than in the State of South Dakota, excepting also such stock as was specifically eliminated from the payment of such compensation in said contract of March 23, 1918, the said corporation should pay to said Baine an additional five per cent (5%) commission in cash for all sales of the said corporate stock so to be made by him under the terms of said contract, except that no cash commission should be paid for the resale of Two Hundred Twenty-five Thousand Dollars (\$225,000) of the capital stock of said corporation which had been re-purchased, and that the said Baine should receive only Four Thousand Dollars (\$4,000) in cash out of the proceeds of the sale of a certain one hundred sixty-five (165) shares of said stock, further details of the said 165 shares of said stock being to the Grand Jurors unknown;

That thereafter, on or about November 9, 1918, the said contract so made and caused to be made by the defendants between the said corporation and the said Baine, were sold, assigned and trans-

ferred, with all of the right, title and interest of the said Baine therein, to the said Tom G. Taylor & Company;

That it was further intended by the defendants as a part of the said scheme and artifice, that the said Baine and Taylor would, in pursuance of the contract hereinbefore mentioned, employ a large number of stock salesmen and agents to call upon persons to be solicited to purchase stock of said corporation for the purpose of creating confidence in the minds of such persons, hereinafter referred to as victims and prospective victims, of legitimate purposes and objects of the said corporation to erect and successfully operate at Sioux City, Iowa, a large packing plant, to be operated at a large profit for the benefit of the said victims, who would purchase the stock of said corporation, and it was intended that the said salesmen and agents would represent and pretend to such victims that the defendants were experienced manufacturers of meat products and well qualified to operate economically and at a large profit, a large packing plant at Sioux City, Iowa, which would result in large profits to the said victims; that the defendants intended that the capital stock of said corporation would be sold to such victims upon the promise and representation that it would pay seven per cent (7%) annual interest or dividends from the date of subscription on the amount thereof, and that the annual interest or dividend on the amount of such subscriptions would increase until the annual interest or dividends would amount to forty per cent (40%) of such subscriptions, and that the said seven per cent interest or dividends to be received on the stock so to be subscribed for by the said victims, would pay the interest of six per cent (6%) on the notes given by the said victims to the said corporation in pursuance of such subscriptions, leaving a margin of one per cent (1%) profit per annum thereon; that the said victims would not be called upon to pay notes so obtained and to be obtained, when due, as the increase in the value of the stock and the dividends to be received up to the time of the maturity of said notes, would be sufficient to take up the said notes given by said victims; that it would also be represented to such victims that at any time they were dissatisfied with their purchase of such stock obtained as aforesaid, that the same would be resold by the said corporation and that the said salesmen and agents, without loss to the victims and that the notes so to be obtained would be taken up and surrendered to them, and that the said victims would not be required to pay the same to the said corporation;

And the defendants intended to and did, as a further part of said scheme and artifice, insert large advertisements in various publications sent by and through the United States mails to a large number of farmers located in the States of Iowa, South Dakota, Nebraska and elsewhere, all of which were intended to reach and be read by the said victims, the purpose of said advertising being to induce the said victims to open up correspondence with the defendants and said corporation, in order that the stock of said corporation might be sold to them in the manner and upon the terms and conditions aforesaid:

That the defendants intended to and did, as a further part of said scheme and artifice to defraud, during the years 1918 and 1919, the

exact dates being to the Grand Jurors unknown, enter into pretended agreements with pretended subscribers for large blocks of the capital stock of said corporation, who would be persons of small or no financial worth and unable to purchase or pay for the stock so to be subscribed for by them, which said agreements would purport to show that the said pretended subscribers or purchasers of stock were to pay the par value thereof to the said corporation, the intent and purpose of the defendants being thereby to make it appear that such large blocks of the capital stock of said corporation had been sold to the said pretended purchasers, and to pay themselves, through said Baine and Taylor, large commissions out of the funds and property of said corporation for the pretended sale of said stock, when in truth and in fact, the defendants had agreed with such pretended subscribers that they would not be required to pay for or purchase the stock so subscribed for, and that they would not be called upon to pay any notes to be given therefor by them for such stock, but would receive a small quantity of stock of the said corporation for signing such stock subscriptions, which they would not be required to pay for, the object of the defendants being that said stock would be resold at One Hundred Twenty-five Dollars (\$125) or more per share, and that all money, bonds, notes and other things of value received and to be received upon the said stock so to be sold, in excess of the par value thereof, would be divided among the defendants and by them appropriated to their own personal use and not for the use or benefit of the said corporation; that the stock so to be resold under this said arrangement and scheme was to be and was subscribed for by victims on the regular subscription blanks of said corporation, and was to be and was represented by the defendants to be treasury stock of the said corporation;

That the said defendants intended, as a further part of the said scheme and artifice, to and did subscribe for large blocks of the capital stock of said corporation, at the par value thereof, with the intention of not paying for the said stock so subscribed for by them, and with the intention of reselling such stock for a price or sum in excess of the par value thereof, to victims, and to appropriate to and divide among themselves, all money, bonds, notes or other things of value that should be received in the resale of such stock in excess of the par value thereof; that the stock resold and to be resold [fol. 29] under this agreement was to be subscribed for on the regular subscription blanks of the said corporation and purport to be subscriptions for stock of said corporation, and was to be and was represented to the said victims as the treasury stock of the corporation.

That the said defendants intended to and did, as a further part of said scheme and artifice to defraud, pay dividends out of the proceeds of the sale of capital stock and out of funds of said corporation not earned by it as profits from the operation of its business, of seven per cent (7%) on preferred capital stock of said corporation at the expiration of one year after such stock was paid for by the said victims who purchased the same, and represented and pretended and caused it to be represented and pretended to the said victims that the divi-

dends so paid had been earned by said corporation and were the legitimate profits earned in the business of the said corporation, and the defendants issued and sent out and caused to be issued and sent out by mail, to the said victims, a form of dividend letter representing to and assuring the said victims that the said dividends so being paid were earned by and as the legitimate profits of said corporation, the object and intent of the defendants in sending out said letters in connection with the said dividends being to represent to and reassure the said victims that the said corporation was earning profits out of which dividends could legitimately be paid, and of the integrity and efficiency of the management and operation of the said corporation, and with the intention of assisting the said Taylor and the stock salesmen and agents employed by him in the sale of the stock of the said corporation, to sell more of the said stock to the said victims, and that soon after the payment of such dividends the said victims would be called on by the said Taylor and his stock salesmen and agents employed by him in sale of the stock of said corporation and be solicited to purchase additional stock in the said corporation on the faith of such dividends, it being further intended by the defendants that the said Taylor and his said stock salesmen and agents would represent to such victims that the stock of said corporation was valuable and was paying legitimate dividends of seven per cent (7%) per annum and would soon pay as high as forty per cent (40%) per annum;

That the defendants intended, as a further part of the said scheme and artifice to defraud, to represent and pretend to the said South Dakota State Securities Commission and others to the Grand Jurors unknown, for the purpose of deceiving and defrauding the said victims, and did with that intent and purpose, on or about the 8th day of April, 1919, and on or about the 22nd day of November, 1919, and at other times the exact dates being to the Grand Jurors unknown, make and cause to be made and sent to the said South Dakota State Securities Commission, through the United States mail, certain letters and documents, in and by which it was stated and represented, among other things, that every dollar's worth of material purchased by the plant of said corporation had been paid for in cash, that the plant would be operated for the making of legitimate profits, that dividends would be paid from the earnings, that the plant would be clear of encumbrance and would be kept so for the protection of thousands of investors in their preferred stock, that the said corporation was paying a guaranteed seven per cent (7%) dividend upon its stock out of the funds from profits derived from the purchase of products of other packers and the resale of the same, such statement, and representations being so made for the purpose of inducing said South Dakota State Securities Commission to continue in force the authority theretofore granted by it to the said corporation to sell its [fol. 30] capital stock within the State of South Dakota, and thus enable the defendants to cause the capital stock of said corporation to be sold to the said victims within the said State of South Dakota;

That each and all of the aforesaid statements, representations and promises, as the defendants and each of them then and there well

knew, would be and were false and fraudulent, and defendants did not, when said promises and representations were made, intend to carry out or perform the same and well knew that said corporation could not and would not carry out or perform the same, and the said defendants intended thereby to deceive and defraud the said corporation, and the said victims, and to induce the said victims to part with their money and property in the purchase of the said capital stock of the said corporation and in the subscriptions so obtained and to be obtained from the said victims for the said capital stock in said corporation, in the manner and by the means aforesaid.

And the said defendants, so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 1st day of April, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail by the postoffice establishment of the United States according to the direction thereon, at the town of Viborg and within the Division and District aforesaid, and within the jurisdiction of this court, a certain letter, dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. Martin Christiansen, Viborg, S. D., R. No. 2, Box 74, and which said envelope then — there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 31st day of March, 1920, placed and caused to be placed in the mails of the United States with an uncanceled two (2) cent postage stamp thereon, at the City of Sioux City, in the State of Iowa, for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Martin Christiansen, one of the said victims, and the person to whom it was directed, according to the directions thereon, at the town of Viborg, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the postoffice establishment of the United States according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

[fol. 31]

Count 1

Midland Packing Company

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

March 31st, 1920.

Mr. Martin Christiansen, Viborg, S. D.

DEAR Mr. CHRISTIANSEN:

We have your favor of March 30th, and are very much pleased that you wrote us because the rumors which have reached you are entirely false.

The Midland Packing Company is not now in the hands of the receiver, has not been, and there is no possibility of it so being. We have neither sold to Swift & Co., have no such move in contemplation, and the attitude we have taken in connection with not killing for the past ten days has been based upon our judgment that no profits could be made by so doing.

It is unfortunate that we are compelled to follow our judgment in these matters rather than listen to the idle gossip of people who do not have any money invested. The financial condition of the Midland Packing Company has never been in as favorable a condition as it now is, and my warm personal regard for you is such that if I felt the slightest cause for alarm, I should advise you, and I am sure that if the people who gave the rumors would take as much time to investigate as they do to believe, they would find that it comes from the mouths of people whose judgment either financially or on a business question is of no value. Any statements made are of such a character that they are only made with a view of hurting us, and as I said before, without reference to how it may seem to outsiders, we shall be compelled to conduct the business of the plant along the lines which we conceive will make the most profit to stockholders, and whether it pleases or displeases those who have no interest, we do not expect to conduct the business when there are no profits to be gained.

I should be glad to see you at any time personally at the plant, and go over matters fully with you.

With cordial personal regards, I remain,

Yours very truly, Midland Packing Company. B. I. Salinger, Jr., Vice-President.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dig-

nity of the United States, and contrary to the form of the statute of the same in such case made and provided.

[fol. 32]

Count 2

And the Grand Jurors aforesaid, on their oaths aforesaid, further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph on page sixteen beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 5th day of February, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by registered mail, by the postoffice establishment of the United States, according to the direction thereon, at the town of Lyonville and within the Division and District aforesaid and within the jurisdiction of this court, a certain registered letter, dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. A. L. Will, Lyonville, via Kimball, S. D., and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Co., Sioux City, Iowa. Registered. C 2965. Register. Return Receipt Requested.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 4th day of February, 1920, placed and caused to be placed in the mails of the United States with uncanceled postage stamps of the denomination as follows: one (1) ten (10) cent and two (2) two (2) cent postage stamps thereon at the City of Sioux City in the State of Iowa for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said A. L. Will, one of the said victims, and the person to whom it was directed, according to the directions thereon, at the town of Lyonville, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the post office establishment of the United States according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

February 4th, 1920.

Mr. A. L. Will, Lyonville, Kimball, S. D.

DEAR SIR:

We are enclosing herewith stock certificate No. SD-85 for fifty shares of common stock, which you purchased from us, together [fol. 33] with a receipt for same which kindly sign and return to us in the stamped envelope attached.

As you no doubt know, the plant is now in operation and if you are in the city at any time, we trust we may have the pleasure of a visit from you and an opportunity of going over the entire project.

Very truly yours, Midland Packing Company. Fred C. Sawyer, President. FCS:HL.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 3

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count.

And the said defendants so having devised and intending to devise as aforesaid, a scheme and artifice to defraud, did, on or about the 9th day of April, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the town of Armour and within the division and District aforesaid, and

within the jurisdiction of this court, a certain letter dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. Frank Groesbeck, Armour, South Dakota, and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit; on the 8th day of April, 1920, placed and caused to be placed in the mails of the United States with an uncanceled two (2) cent postage stamp thereon at the City of Sioux City, in the State of Iowa, for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Frank Groesbeck, one of the said victims, and the person to whom it was directed, according to the directions [fol. 34] thereon, at the town of Armour, State of South Dakota, and which said letter was thereupon delivered by mail by the post office establishment of the United States according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Midland Packing Co.

Capital \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

April 8th, 1920.

Mr. Frank Groesbeck, Armour, South Dakota.

DEAR MR. GROESBECK:

Your letter of recent date, in which you make inquiry concerning your dividend has been referred to me for answer.

The fact that your stock has now been issued for one year, is evidence of your early faith in our institution and your belief that after we have commenced operation, that substantial profits might be made upon the investment. Because of the vast amount of money required in the operation of our plant, which is now enjoying a prosperous trade, and the fact that all of our money was needed for that purpose, has caused the Board of Directors to pass a resolution which is as follows:

"Whereas, guaranteed dividends have been paid to such stockholders as have accumulated upon stock issued for the past several months, and

Whereas, the plant is practically completed and ready for commencement of operation, and for the purposes of handling the dividends in compliance with the fiscal years of the company; be it

Resolved, that further dividends be accrued up to July 1st, 1920, and that upon that date all dividends accrued upon stock issued to that date shall become due and payable and that thereafter all dividends earned and accrued shall be payable from the office of the Secretary quarterly of each fiscal year, and the Secretary is hereby directed by this resolution to arrange his books in conformity to this resolution and pay dividends in compliance with this resolution of the Board of Directors."

This has been passed for the purpose of enabling us to use all our funds for the purposes mentioned and as business men and investors, I am sure that you will agree with me that it will be unwise to borrow money for operation, when the use of the money we have will bring us greater rates and under this rule all dividends will be paid quarterly and such dividends as may be due at this time and are not paid will accrue to you and will be paid at the quarterly period provided by the resolution.

We trust that you will agree with us in the wisdom of this decision and we ask your patience and judgment of the work that we are doing, because we feel confident that the prospects, based upon the [fol. 35] splendid business we have been enjoying since operation, will fully justify this action.

Very truly yours, Midland Packing Company. C. H. Burlingame, Treasurer. CHB:R. R.

That at the time of causing said letter to be delivered by mail of the United States according to the direction thereon the said defendants then well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 4

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 2nd day of May, 1920, in and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do unlawfully, feloniously and knowingly, did cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the town of Viborg, and within the Division and District aforesaid and within the jurisdiction of this court, a certain letter, dated at Sioux City, Iowa, and enclosed in an

envelope and addressed and directed to Martin Christiansen, Viborg, S. D., and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 1st day of May, 1920, placed and caused to be placed in the mails of the United States with an uncanceled two (2) cent postage stamp thereon, at the City of Sioux City, in the State of Iowa, for mailing and delivery, with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Martin Christiansen, one of the said victims and the person to whom it was directed, according to the directions thereon, at the town of Viborg, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the post office establishment of the United States, according to the directions thereon, which said letter was as follows (omitting the pictures engraved on printed letterhead thereof), to-wit:

[fol. 36]

Midland Packing Company

Midland Packing Co.

Capital \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

April 30th, 1920.

To all Stockholders:

We are enclosing the editorial page of the Sioux City Tribune for April 29th, 1920, calling your attention to the marked editorial. The saneness and candor of the views therein expressed, we believe, are beyond question. No bias or prejudice colors the statements and the writer merely voices his opinion of the sensible attitude that should be adopted by the stockholder.

In a business sense, the Midland Packing Company is a co-partnership, in which every stockholder is a partner. The future welfare of the Company and its reputation is a matter of vital concern to each subscriber to stock.

View the situation calmly. If you have matters that need adjustment, come to the stockholders' meeting that will be held in the near future and make known your troubles. If you have suspicions arising from the many false and malicious rumors, arrange at that time for an investigation. As a business proposition and in fairness to yourselves and the Company, try to preserve rather than destroy that which is yours.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 5

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege, and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 28th day of April, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause [fol. 37] to be delivered by mail, by the post office establishment of the United States, according to the directions thereon, at the town of Platte, and within the Division and District aforesaid, and within the jurisdiction of this court, a certain letter dated at Sioux City, Iowa, and enclosed in an envelope and addressed and directed to Mr. Thos. Mansheim, Platte, S. D., and which said envelope then and there bore a return card as follows, to-wit:

Midland Packing Company. Midland Packing Co. Sioux City, Iowa, U. S. A.

and which said envelope and letter therein contained was by the said defendants lately before, to-wit: on the 27th day of April, 1920, placed and caused to be placed in the mails of the United States, with two (2) uncanceled two (2) cent postage stamps thereon, at the City of Sioux City, in the State of Iowa, for mailing and delivery with the intent on the part of the defendants that said letter and said envelope should be carried by the mails of the United States and delivered to the said Thos. Mansheim, one of the said victims and the person to whom it was directed, according to the directions thereon, at the town of Platte, State of South Dakota, and which said letter aforesaid was thereupon delivered by mail by the postoffice establishment of the United States according to the directions thereon, which said letter was as follows, (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company, Sioux City, Iowa

Plant correspondence.

April 27th, 1920.

To all stockholders:

We take pleasure in enclosing a pamphlet which contains the by-laws of the Midland Packing Company. This pamphlet gives you information as to how the officers are elected, their powers and duties, how and when directors are elected, their terms of office, when and where meetings are held, as well as facts regarding the stock, its voting power and information regarding dividends and manner in which finances are handled.

We are also enclosing a pamphlet issued by the Sioux City Chamber of Commerce, which contains information and statistics about the different industries in and around Sioux City.

We call your special attention to the several references made to the Midland Packing Company, which will give you an idea what the business men of Sioux City think about the Midland Packing Company, in which you have invested your money. By special request the Chamber of Commerce have favored us by furnishing enough pamphlets to send one to each stockholder.

Both these pamphlets should be read very carefully, as they contain valuable information regarding the gigantic house in which you are financially interested, and its success depends greatly upon the co-operation of its stockholders.

Yours very truly, Midland Packing Company.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose [fol. 38] of executing said scheme and artifice; Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 6

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby re-affirm, re-allege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised" and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did on or about the 21st day of June, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice, and attempting so to do, unlawfully, feloniously and knowingly, did

cause to be delivered by mail by the post office establishment of the United States, according to the direction thereon, at the town of Bridgewater, State of South Dakota, and within Division and District aforesaid, and within the jurisdiction of this court, a certain letter, to-wit: a letter directed to Mr. W. J. Shanard, Bridgewater, S. D., which said defendants then lately before, to-wit: on or about June 21st, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said W. J. Shanard at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company, Packers, Sioux City, Iowa

Midland Packing Co.

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Pres. & Genl. Counsel; C. H. Burlingame, Secretary & Treasurer.

June 21, 1919.

Mr. W. J. Shanard, Bridgewater, S. D.

DEAR SIR:

Your ten shares of preferred stock purchased on the 21st day of June, 1918, entitled you to the 7% guaranteed dividend due and payable on the 21st day of June, 1919.

We are pleased to advise you that we have been fortunate enough to make sufficient legitimate profits to be able to pay you the dividend at this time, and we are enclosing you herewith check for \$70, of which kindly acknowledge receipt.

You were among the first purchasers of stock in the project, and despite war and labor conditions we hope to have the plant complete and running within less than a year's time from the commencement of actual building, an unprecedented accomplishment, we think, and we feel that the structure which is now nearing completion will be one of the finest packing houses in the Middle West. [fol. 39] We express the hope that you will call upon us when you are in Sioux City, and look over the investment, and we feel that if you do so you will feel the investment is one which has been justified, and that in the future you may hope for substantial returns upon your investment.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS:A.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 7

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did on or about the 24th day of October, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Viborg, State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this court, a certain letter directed to Mr. Martin Christiansen, Viborg, S. D., which said defendants then lately before, to-wit: on October 23, 1919, placed and caused to be placed in the post office of the United States at Sioux City, Iowa, for delivery by the post office establishment of the United States to said Martin Christiansen at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred. C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & General Counsel; C. H. Burlingame, Secretary and Treasurer, Sioux City, Iowa, U. S. A.

October 23rd, 1919.

Mr. Martin Christiansen, Viborg, S. D.

DEAR SIR:

Referring to your sale of October 22nd, Mr. Spellings and Mr. Colby have advised us of this sale and of their promises made to you in connection with its resale, and this is to advise you that the company has been informed and thoroughly understands their [fol. 40] promises to you and that your note will not be sold or negotiated or used as collateral pending its life.

Very truly yours, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. BIS-t.

That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defend-

ants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 8

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 5th day of November, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail, by the postoffice establishment of the United States, according to the direction thereon, at the town of Centerville, State of South Dakota, and within the Division and District aforesaid and within the jurisdiction of this court, a certain letter, to-wit: a letter directed to Mr. P. C. Peterson, Centerville, S. D., which said defendants then lately before, to-wit, on November 4th, 1919, placed and caused to be placed in the post office of the United States at Sioux City, Iowa, for delivery by the post office establishment of the United States to said P. C. Peterson at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

November 4th, 1919.

Mr. P. C. Peterson, Centerville, S. D.

DEAR SIR:

Messrs. Colby and Spellings have advised us of their arrangements with you, which we thoroughly understand. You may be assured that they will carry out their contract.

Yours very truly, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. BIS-t.

[fol. 41] That at the time of the placing and causing to be placed the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 9

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment except these allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did on or about the 12th day of June, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly, did cause to be delivered by mail, by the postoffice establishment of the United States, according to the direction thereon, at the town of Vermilion, State of South Dakota, and within the division and District aforesaid, and within the jurisdiction of this court, a certain letter, to-wit: a letter directed to Mr. Theo. Ankor, Vermilion, S. D., which said defendants then lately before, to-wit: on June 11, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said Theo. Ankor, at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letter-head thereof), to-wit:

Midland Packing Company, Packers, Sioux City, Iowa

Midland Packing Co.

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice-Pres. & Genl. Counsel; C. H. Burlingame, Secretary & Treasurer.

June 11th, 1919.

Mr. Theo. Anker, Vermilion, S. D.

DEAR MR. ANKER:

Your twenty-five shares of preferred stock purchased on the eleventh day of June, 1918, entitle you to the 7% guaranteed dividend, due and payable on the eleventh day of June, 1919.

We are pleased to advise you that we have been fortunate enough to make sufficient legitimate profits to be able to pay you the divi-

dend at this time, and we are enclosing herewith check for \$175.00, for which kindly acknowledge receipt.

You were among the first purchasers of stock in the project, and despite war and labor conditions, we hope to have the plant complete and running within less than a year's time from the commencement of actual building, an unprecedented accomplishment, we think, and [fol. 42] we feel that the structure which is now nearing completion will be one of the finest packing houses in the Middle West. We express the hope that you will call upon us when in Sioux City and we feel that if you do so you will feel the investment is one which has been justified, and that in the future you may hope for substantial returns upon your investment.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS/MP.

that at the time of the placing and causing to be placed in the said letter in the post office of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 10

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count;

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 23rd day of August, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice, and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail, by the post office establishment of the United States, according to the direction thereon, at the town of Springfield, State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to wit: a letter directed to Mr. Will Hartman, Springfield, S. D., which said defendants then lately before, to wit: on August 22nd, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said Will Hartman at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. E. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

August 22nd, 1919.

Mr. Will Hartman, Springfield, S. D.

DEAR MR. HARTMAN:

We enclose you herewith stock certificate, representing the stock which you recently purchased, together with a receipt for same, which kindly sign and return in the enclosed stamped envelope at your convenience.

[fol. 43] We are very glad indeed to number you among our stockholders, and we appreciate the assistance you have rendered our representative. We are pleased to advise you that the progress of the plant at this time is very gratifying to the officers of the Company, and we trust that if you are at any time in Sioux City we may have the pleasure of a visit with you, and an opportunity of going over the entire project.

Yours very truly, Midland Packing Company. Fred C. Sawyer, President. FCS/MP.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 11

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 25th day of October, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Kimball,

State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. A. L. Will, Kimball, S. D., which said defendants then lately before, to-wit: on October 24th, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said A. L. Will at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary and Treasurer, Sioux City, Iowa, U. S. A.

October 24th, 1919.

Mr. A. L. Will, Kimball, S. D.

DEAR SIR:

We thank you for your prompt attention to the renewal of your note and acknowledge receipt of check for \$225.00 interest.

[fol. 44] We enclose herewith your cancelled note and wish to assure you of our sincere appreciation of the confidence you have shown in our project. The plant is practically ready for operation and we feel that the future of the business is assured.

Yours very truly, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. PLV/Mc.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 12

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the 7th day of January, 1920, in and for executing said scheme and

artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Armour, State of South Dakota, and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. Ardie C. Jensen, Armour, S. D., which said defendants then lately before, to-wit: on January 6th, 1920, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said Ardie C. Jensen at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

January 6, 1920.

Mr. Ardie C. Jensen, Armour, S. D.

DEAR SIR:

Your note for \$1,000 will be due January 15th, with interest at [fol. 45] 6% from date. If you will advise us to what bank you wish your note sent for collection same will be promptly sent.

Yours very truly, Midland Packing Company. B. I. Salinger, Vice President and General Counsel. BIS-t.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 13

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about the

13th day of January, 1920, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon at the town of Viborg, S. D., and within the Division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. P. L. Peterson, Mr. Alfred Christianson, c/o H. E. Monk, Viborg, S. D., which said defendants then lately before, to-wit: on January 12th, 1920, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said P. L. Peterson and Mr. Alfred Christianson at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company

Midland Packing Co.

Capital, \$8,000,000.00

Fred C. Sawyer, President; B. I. Salinger, Jr. Vice Prest. & General Counsel; C. H. Burlingame, Secretary & Treasurer, Sioux City, Iowa, U. S. A.

January 12th, 1920.

Mr. P. L. Peterson, Mr. Alfred Christianson, c/o H. E. Monk, Viborg, S. D.

GENTLEMEN:

Mr. Colby has called to our attention the contract which he has entered into with you, and this letter is written to advise you that [fol. 46] the company is fully aware of the contract entered into and of the conditions of Mr. Colby's agreement with you.

Yours very truly, Midland Packing Company. B. I. Salinger, Jr., Vice President and General Counsel. T. BIS-t.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Count 14

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That they do hereby reaffirm, reallege and incorporate as if herein set forth in full, all of the allegations of the first count of this indictment.

ment, except those allegations contained in the last paragraph thereof, on page sixteen, beginning with the words "And the said defendants so having devised," and continuing to the end of the first count:

And the said defendants so having devised and intending to devise the aforesaid scheme and artifice to defraud, did, on or about June 21st, 1919, in and for executing said scheme and artifice and attempting so to do, and for the purpose and with the intention on their part of executing said scheme and artifice and attempting so to do, unlawfully, feloniously and knowingly did cause to be delivered by mail by the postoffice establishment of the United States, according to the direction thereon, at the town of Alcester, State of South Dakota, and within the division and District aforesaid, and within the jurisdiction of this Court, a certain letter, to-wit: a letter directed to Mr. W. M. Rowley, Alcester, S. D., which said defendants then lately before, to-wit: on June 20th, 1919, placed and caused to be placed in the postoffice of the United States at Sioux City, Iowa, for delivery by the postoffice establishment of the United States to said W. M. Rowley at said address, and which then was and is of the tenor following (omitting the pictures engraved on printed letterhead thereof), to-wit:

Midland Packing Company, Packers, Sioux City, Iowa

Midland Packing Co.

Fred C. Sawyer, President; B. I. Salinger, Jr., Vice Pres. & Genl. Counsel; C. H. Burlingame, Secretary & Treasurer.

June 20th, 1919.

Mr. W. M. Rowley, Alcester, S. D.

DEAR SIR:

Your twenty shares of preferred stock purchased on the 24th day of June, 1918, entitle you to the 7% guaranteed dividend due and payable on the 24th day of June, 1919.

[fol. 47] We are pleased to advise you that we have been fortunate enough to make sufficient legitimate profits to be able to pay you the dividend at this time, and we are enclosing you herewith check for \$140.00, of which kindly acknowledge receipt.

You were among the first purchasers of stock in the project, and despite war and labor conditions we hope to have the plant complete and running within less than a year's time from the commencement of actual building, an unprecedented accomplishment, we think, and we feel that the structure which is now nearing completion will be one of the finest packing houses in the Middle West. We express the hope that you will call upon us when in Sioux City, and look over your investment, and we feel that if you do so you will feel the investment is one which has been justified, and that in the future you may hope for substantial returns upon your investment.

Yours very truly, Midland Packing Company, Fred C. Sawyer, President. FCS-t.

that at the time of the placing and causing to be placed the said letter in the postoffice of the United States as aforesaid, the defendants then and there well knew that said letter was for the purpose of executing said scheme and artifice; Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

S. Wesley Clark, United States Attorney for the District of South Dakota.

Names of witnesses sworn and examined before the Grand Jurors: Paul Miller, John P. Denahy, Humphrey Statter, R. M. Stokes, W. J. Shannard, Eunice McLaughlin, Mae Paulson, Martin Christenson, H. B. Martin, Mrs. Bob Thayer, W. Hughes.

(Endorsed:) No. 983 W. D.—United States District Court, District of So. Dak., Western Division.—The United States of America vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., Defendants.—Indictment Vol. Sect. 215 Penal Code—using the mails to defraud.—A true bill, Samuel W. Huntington, Foreman.—Filed in open Court this 20th day of May, A. D. 1922, Jerry Carleton, Clerk.

[fol. 48] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

No. 17238

[Title omitted]

REPORT OF HEARING APRIL 20, 1923—Filed May 2, 1923

Proceedings had in the above entitled and numbered matter on hearing in open court before the Hon. Rufus E. Foster, Judge, on the 20th day of April, 1923

Appearances: St. Clair Adams, Esq., Attorney for the Petitioner; Louis P. Bryant, Esq., U. S. Asst. District Attorney, and S. W. Clark, Esq., District Attorney for the District of South Dakota, Representing the Respondent.

Mr. Bryant: The Government presents a motion praying for order for removal of B. I. Salinger, Jr., and submits herewith motion and order, together with commitment attached.

[fol. 49] We file also the return of the Marshal in the proceeding No. 17,233, entitled B. I. Salinger vs. Victor Loisel, and also the return of the Marshal in the proceeding No. 17,238, entitled B. I. Salinger Jr., versus Victor Loisel, also in response to writ of Certiorari, directed to United States Commissioner A. H. Browne.

Offer

Mr. Adams: Counsel for the relator offers in evidence certified copy of the indictment described in the writ, and, secondly, certified copy of an application for order of transfer to the District Court of the United States for the District of South Dakota, Western Division.

FRED C. SAWYER, sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. Fred C. Sawyer.

Q. What is your business?

A. Manufacturer's agent.

Q. What is your address?

A. 1814 Mission Street, South Pasadena, California.

Q. Do you know Mr. C. H. Burlingame?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the Mr. Sawyer who is jointly indicted in the District Court of the United States for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1st, 1919, and May 10, 1920?

A. I was not in Dakota during that period.

Q. You were not in South Dakota during that period of time?

A. No sir.

[fol. 50] No cross-examination.

C. H. BURLINGAME, sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. C. H. Burlingame.

Q. What is your business?

A. I am employed by the California Bank, Los Angeles, in the position of manager.

Q. Do you know Mr. Fred C. Sawyer?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the C. H. Burlingame who is jointly indicted with these gentlemen in the District of South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the state of South Dakota between June 1st, 1919, and May 10, 1920?

A. Not at all.

No cross-examination.

B. I. SALINGER, Jr., sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. B. I. Salinger, Jr.

Q. You are the petitioner in these proceedings for a writ of habeas corpus. are you not?

A. I am.

Q. Where is your home, in what state is it located?

A. My home is in Sioux City, Iowa.

Q. Do you know Mr. C. H. Burlingame and Mr. Fred C. Sawyer who were just on the stand?

A. I do.

[fol. 51] Q. Are you the same B. I. Salinger, Jr., who is jointly indicted with those gentlemen in the United States District Court for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1, 1919 and May 10, 1920?

A. None at all.

No cross-examination.

Mr. Adams: I suggest that we make the following agreement:

It is agreed that the testimony already taken on the present petition for writ of habeas corpus shall be used in the other case, No. 17,233, just as if the same were actually taken in that case, it being further understood, however, that this agreement shall not be considered to be a consolidation of the two cases. It is furthermore agreed that the testimony referred to above shall also be used and deemed to have been taken in the application of the *of the* government for warrant of removal.

Mr. Clark: It being understood, however, that the said removal proceedings are separate and distinct from the habeas corpus proceedings.

Mr. Adams: I can't make that agreement.

Testimony for the Government

T. I. GALBREATH, sworn and examined as a witness on behalf of the respondent, testified as follows:

Direct examination.

[fol. 52] By Mr. Bryant:

Q. What is your name?

A. T. I. Galbreath.

Q. You are United States Deputy Marshal here, are you not?

A. Yes, sir.

Q. Did you have occasion to see the plaintiff, Ben I. Salinger, Jr., on the 31st of March, 1923?

A. I don't remember the date, but it was on the date that Mr. Parsons brought him up to the Commissioner's office whatever date that was.

Q. State the circumstances in detail of this presentation of Salinger?

A. I answered a phone call this morning—

Objection

Mr. Adams: I object to this testimony. I can't see what probative value it can possibly have.

The Court: Whom did you receive the phone call from?

The Witness: The Clerk's office.

The Court: Well, omit all that. Just tell what took place when Salinger and Parsons came.

Q. Go ahead.

A. Well, Mr. Parsons came into the office with him, and I turned from my desk just as Mr. Parsons had spoken to some deputy in the office—

Objection

Mr. Adams: I object to anything he said to any deputy in the office.

A. —and I walked out and saluted Mr. Parsons as he was leaving the office. Mr. Salinger was left in the office in charge of—well, I really took Mr. Salinger in charge—he stayed in there a little while and brought him into the private office, into the office where I was working, to keep him from being interviewed or addressed by the newspaper people.

[fol. 53] Q. Well now, what, if anything, was said to you by Parsons on that occasion?

Objection

Mr. Adams: I object, if your Honor please. How can we be bound by anything the counsel for the surety company did?

The Court: Anything Mr. Parsons said in the presence of Mr. Salinger is admissible.

Cross-examination.

By Mr. Adams:

Q. As a matter of fact, you did have Mr. Salinger in custody, when he was detained in the private office of the Marshal, did you not?

A. Oh yes.

Q. Absolutely no doubt about that, is there?

A. We had him in there all right.

Q. And, further, there is no doubt about the fact you didn't release him until the habeas corpus was served?

A. No sir, I didn't.

Q. And until you saw a bond that had been approved by the United States District Judge?

A. Yes Sir.

Q. As a matter of fact, you came down to the Clerk's office and you examined yourself that bond before you permitted Mr. Salinger to leave your custody, did you not?

A. Not only examined the bond but read the order of the Court, and then I went to satisfy myself that that order of court had been strictly complied with before I let Mr. Salinger go.

Q. Prior to your being satisfied with this bond, you detained him under arrest, did you not and in your custody?

[fol. 54] A. Well, from the first time we got sight of Mr. Salinger, why, in view of the fact that the office had been in communication with the United States Marshal and the United States District Attorney from Sioux Falls, why we would have kept Mr. Salinger.

Q. Like any other person?

A. We certainly would.

Q. And you did have him under detention until the writ of habeas corpus was allowed by the court and bond given, didn't you?

A. Yes sir.

By Mr. Bryant:

Q. When Salinger walked into the office, had you ever seen him before?

A. How is that?

Q. When Salinger then walked into the Marshal's office on the first occasion, had you ever seen him before?

A. No sir.

Q. Had you ever heard of Salinger before that first day that he was in your office, surrendered by Parsons?

Objection

Mr. Adams: I object to that "surrendered by Parsons."

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Objection

Mr. Adams: I object to the whole question on the ground that there is nothing in your return or from what this witness has said to indicate that Salinger was surrendered to the Marshal.

Q. Did you ever see him before?

A. No sir.

A. Did you ever hear of him before? I am referring to this occasion that Salinger came into the office.

A. I don't think I ever heard of him before.

[fol. 55] Q. When was it you heard from the United States Attorney's office in Sioux City?

A. I would have to see that telegram to answer.

The Court: That has nothing to do with the case.

Offer

Mr. Clark: We offer in evidence bond, certified copy of bond given by B. I. Salinger, Jr., to the District Court of the United States for the District of South Dakota, at Des Moines, Iowa, on the 13th day of June, 1922, certified to by the clerk of the district court for the District of South Dakota.

Objection

Mr. Adams: Objected to on the ground it is foreign to any issue involved in these proceedings, and irrelevant.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of the record before the Circuit Court of Appeals for the Second Judicial Circuit of the United States, certified to by the Clerk of that Court.

Objection

Mr. Adams: Objected to on the ground it is foreign to the issues of this case, and is irrelevant and res inter alios acta and without probative value here, because there can be no res judicata in matters

of habeas corpus, the petitioner having the right to apply to any judge for such writ, whether he has been denied that right on previous occasions by another judge or not.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of an order of the District Court of the United States for the Southern District of [fol. 56] New York, in the matter of B. I. Salinger, Jr., petitioner for habeas corpus, showing proceedings had in that regard on the 16th day of March, 1923.

Objection

Mr. Adams: We make the same objection to that offer that we did to the entire record in the New York case, just as if we restated that objection here.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence a certified copy transcript from the minutes of the District Court of the United States for the Southern District of New York, showing proceedings had in the matter of the removal of B. I. Salinger, Jr., from the Southern District of New York to the District of South Dakota, of date March 20, 1923.

Objection

Mr. Adams: Objected to on the same ground.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of a bond given by B. S. Salinger, Jr., under the order of the District Court of the Southern District of New York, of date March 20, 1923, and conditioned for his appearance before the United States Court for the District of South Dakota for trial at the opening day of April, 1923 term.

Objection

Mr. Adams: Same objection, just as if restated.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the record of the District Court of the United States for the District of South Dakota [fol. 57] in the matter of the United States vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., showing proceedings had in that court in that cause on the 3rd and 4th days of April, 1923, and consisting of motion for forfeiture of the bond and issuance of bench warrants and the allowance thereof by the Court.

Objection

Mr. Adams: We object on the same ground. It is totally irrelevant to any issues here what transpired in the District of South Dakota when we were down here;

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the bench warrant referred to in the minutes of *of* the Court for the District of South Dakota last received in evidence and which is attached to the Commissioner's return.

Objection

Mr. Adams: Same objection.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the indictment referred to in the Commissioner's return to this court under the writ of certiorari and annexed thereto.

Mr. Adams: We have no objection to that, inasmuch as we have offered it ourselves.

Mr. Burns: Evidence closed on both sides.

[fol. 58] U. S. DISTRICT COURT, EASTERN DIST. OF LOUISIANA,
NEW ORLEANS DIVISION

[Title omitted]

PRÆCIPE FOR APPELLEE—Filed May 21, 1923

To the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division.

SIR:

You will please incorporate in the transcript of appeal to the Supreme Court of the United States in the above numbered and entitled cause, the following:

- (1) Transcript of Record, United States Circuit Court of Appeals for the Second Circuit;
 - (2) Bond given before the Clerk of the District Court of the United States for the Southern District of New York;
 - (3) Certified copy of Order of United States District Court for the Southern District of New York;
 - (4) Minutes of proceedings had in the United States Court for the District of South Dakota on April 23rd, 1923;
 - (5) Bench warrant issued under seal of the United States District Court for the District of South Dakota.
- Respectfully, For the U. S. Atty., (Signed) L. P. Bryant, Jr.,
Assistant U. S. Attorney.

[fol. 59] EXHIBIT IN EVIDENCE: TRANSCRIPT OF RECORD, UNITED STATES CIRCUIT COURT, SECOND CIRCUIT—Filed April 20, 1923

UNITED STATES CIRCUIT COURT FOR THE SECOND CIRCUIT

[Title omitted]

Appeal from Order Dismissing Writs of Habeas Corpus and Certiorari

Gilbert, Campbell & Barranco, Attorneys for Petitioner-Appellant,
No. 14 Wall Street, New York City.

William Hayward, U. S. Attorney, Attorney for Respondent, P. O.
Building, New York City.

[File endorsement omitted.]

[fols. 60 & 61] Index omitted in printing.

[fol. 62]

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the order, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between the United States of America, complainant, and B. I. Salinger, Jr., defendant, a manifest error hath happened to the great damage of the said B. I. Salinger, Jr., as is said and appears by his complaint, We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the Parties aforesaid in this behalf, Do command You, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 13th day December, 1922, with the order and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals, for the Second Circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done

[fol. 62a] Witness the Honorable William H. Taft, Chief Justice of the United States, this 11th day of December, in the year of Our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-seventh.

Alex Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. J. W. Mack, U. S. District Judge. (Seal.)

[fol. 63] At a Criminal Term of the United States District Court Held in and for the Southern District of New York, at the Court-house Thereof, in the Borough of Manhattan, New York City, on the 11th Day of December, 1922.

Present: Hon. John C. Knox, Judge.

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS
AND TO FILE PRINTED RECORD

A motion having been made by the petitioner B. I. Salinger, Jr., on the 11th day of December, 1922, for an order extending the time of the said petitioner to settle and file a bill of exceptions herein to and including the 13th day of January, 1923, and to extend the time of the said petitioner to file his printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit up to and including the said 13th day of January, 1923, and the said motion having duly come on before me to be heard on the said 11th day of December, 1922,

Now after hearing William P. McCool, of counsel for the Petitioner in support of said motion and Maxwell S. Mattuck, Assistant United States Attorney, in opposition thereto, and due deliberation having been had thereon, it is

[fol. 64] Ordered, that the time for the petitioner B. I. Salinger, Jr., to settle and file the bill of exceptions in the appeal herein be and the same hereby is extended ten days from the 12th day of December, 1922, to wit, up to and including the 22nd day of December, 1922; and it is further

Ordered, that the time of the petitioner B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeals, for the Second Circuit, be and the same hereby is extended ten days from December 13th, 1922, to wit, up to and including the 22nd day of December, 1922.

Jno. C. Knox, U. S. D. J.

[fol. 65] At a Criminal Term of the United States District Court Held in and for the Southern District of New York, at the Court-house Thereof, in the Borough of Manhattan, New York City, on the 22nd Day of December, 1922.

Present: Hon. John C. Knox, Judge.

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS
AND TO FILE PRINTED RECORD

A motion having been duly made by petitioner, B. I. Salinger, Jr., on the 22nd day of December 1922 for an order extending the time of

the said petitioner to settle and file bill of exceptions herein up to and including the 27th day of December, 1922, and extending the time of said petitioner to file the printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit up to and including the 27th day of December, 1922, and said motion having duly come on before me to be heard on the said 22nd day of December, 1922.

Now, therefore, after hearing William P. McCool, of counsel, for petitioner, in support of said motion, and Maxwell S. Mattuck, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, it is

[fol. 66] Ordered, that the time of petitioner B. I. Salinger, Jr., to settle and file the bill of exceptions in the appeal herein be and the same hereby is extended up to and including the 27th day of December, 1922: and it is further

Ordered, that the time of petitioner B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeal for the Second Circuit be and the same hereby is extended up to and including the 27th day of December, 1922.

Jno. C. Knox, U. S. D. J.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

BILL OF EXCEPTIONS

Be it remembered, that on the trial of this cause in this Court, at the November, A. D. 1922 term, the Honorable Julian W. Mack, Circuit Judge, presiding, the following proceedings were had and none others, to-wit:

[fol. 67] The petitioner, B. I. Salinger, Jr., presented to the Court writs of habeas corpus and certiorari, granted on the 8th day of November, 1922, together with his petition verified on the 8th day of November, 1922, upon which said writs were granted.

Return to the writ of habeas corpus was made by William C. Hecht, United States Marshal.

Return to the writ of certiorari was made by Hon. Samuel M. Hitchcock, United States Commissioner.

True copies of said writs, petition and returns are annexed hereto and made part of this Bill of exceptions.

A hearing was had before the Court thereon, on the 13th day of November, 1922.

No evidence was introduced upon said hearing.

Upon said hearing the Court granted petitioner's motion to amend all papers and proceedings herein so as to correct the spelling of the name of petitioner to "Salinger"; to which the Government took no exception.

The Court also granted petitioner's motion to amend the petition herein so as — allege that the indictment admitted in evidence by the Commissioner was wholly invalid and the Grand Jury had no power to return the same nor the Commissioner power to take any action founded thereon, for the further reason that said indictment was returned by a Grand Jury sitting for the Western Division of the District of South Dakota, whereas certain members of said Grand Jury did not reside within said Western Division but were [fol. 68] drawn from other Divisions of said District. The Government thereupon conceded that the said Grand Jury was in fact drawn from the entire District of South Dakota and not from the Western Division of said District alone, and took no exception to the granting of petitioner's said motion.

At the conclusion of the argument, petitioner requested an opportunity to present a written brief upon the questions raised by him, which application was denied by the Court; to which ruling the petitioner by his counsel, then and there duly excepted.

At the conclusion of the hearing the Court directed that the said writs of habeas Corpus and certiorari heretofore granted herein be dismissed and that the petitioner be remanded to the custody of William C. Hecht, United States Marshal for the Southern District of New York, pending his removal to the demanding District; to which ruling of the Court the petitioner by his counsel, then and there duly excepted, and then and there announced in open Court that he would appeal from such ruling and determination to the Circuit Court of Appeals for the Second Circuit and duly saved his exceptions.

The Court directed that a formal order be prepared and entered upon its decision dismissing said writs over the exception of petitioner to which ruling, and the entry of which order, the petitioner, by his counsel, then and there duly excepted. Pursuant to said direction of the Court said formal order was entered on the 15th day of November, 1922.

After the conclusion of said hearing and on November 14th 1922, William C. Hecht, United States Marshal, Presented to the Court a further return to the writ of habeas corpus, verified November 14th 1922.

[fol. 69] In furtherance of justice and that right may be done, the Said B. I. Salinger, Jr., petitioner, tenders and presents the foregoing (together with the documents and exhibits referred to herein and made part hereof) as his bill of exceptions to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made part of the record and the same is accordingly done, this 27th day of December, A. D. 1922.

By the Court: (Signed) Julian W. Mack, Judge.

[fol. 70] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

WRIT OF HABEAS CORPUS

The President of the United States to Honorable William C. Hecht,
United States Marshal, Greeting:

We command you, That you have the body of B. I. Salinger, Jr., by you imprisoned and obtained, as it is said together with the time and cause of such imprisonment and detention by whatsoever name said B. I. Salinger, Jr., shall be called or charged before me or the Judge presiding at a Criminal Term of this Court to be held in and for the Southern District of New York at the Court House thereof, Old Post Office Building Borough of Manhattan, New York City, on the 13th day of November, 1922 at ten thirty o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning him, and have you then there this writ.

Witness, Honorable Learned Hand, a Judge of the District Court of the United States, the 8th day of November, one thousand nine hundred and twenty-two.

Alex Gilchrist, Clerk. (United States Seal of the Court of the Southern District.) Gilbert, Campbell & Barranco, Attorneys.

Writ allowed bond in the sum of \$10,000. J. W. M., C. J.

[fol. 71] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

WRIT OF CERTIORARI

The President of the United States to Hon. Samuel M. Hitchcock,
a Commissioner of the United States, Greeting:

Commands you, that you certify fully and at large to United States District Court, Southern District of New York, Criminal Division, Criminal Term at the Court House thereof, Old Post Office Building, Manhattan, New York City, on the 13th day of November, 1922, at 10:30 A. M. the day and cause of the imprisonment of B. I. Salinger, Jr., by you detained; as is said by whatsoever name the said B. I. Salinger, Jr., shall be called or charged; and have you then this writ.

Witness Hon. Learned Hand, a Judge of the United States District Court, the 8th day of November 1922.

Alex. Gilchrist, Clerk. (Seal of the United States for Southern District Court.) Gilbert, Campbell & Barranco, Attorneys.

Writ allowed. J. W. M., C. J.

[fol.72] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI
—Filed Nov. 8, 1922

The petition of B. I. Salinger, Jr., of Sioux City, State of Iowa, respectfully shows to this Court:

That your petitioner is unjustly and unlawfully detained and restrained of his liberty by, and in the Custody of William C. Hecht, the Marshal of the Southern District of New York.

That your petitioner is not detained and restrained by virtue of any final judgment of any Court of competent jurisdiction of any State.

That to the best of the knowledge, information and belief of your petitioner the pretense for his detention is that said Marshal claims the right to hold said petitioner and imprison him by virtue of a certain Warrant of Commitment issued under the circumstances hereinafter related.

That your petitioner is and for many years has been a resident and citizen of the United States and of the State of Iowa.

[fol.73] That on or about May 20, 1922, your petitioner is informed, the Grand Jury of the United States District Court, for the Eastern Division of the District of South Dakota returned to said Court a certain indictment wherein and whereby, the said Grand Jury charged that your petitioner and certain other parties named in said indictment were guilty of a violation of Section 215 of the Penal Code of the United States; that as the sole basis for said charge, as your petitioner is informed and believes it was alleged that said defendants had placed in the Post Office of the United States at Sioux City, Iowa, certain letters in consummation of a scheme and artifice to defraud certain persons denominated in said indictment as "the victims."

That on or about the 21st day of October, 1922, your petitioner was arrested by the Marshall of the Southern District of New York. That your deponent is informed and believes that he was arrested pursuant to a warrant which had theretofore been issued by Hon. Daniel M. Hitchcock, United States Commissioner, upon the affidavit and complaint of Maxwell S. Mattuck, Esq., Assistant United States Attorney for the Southern District of New York said complaint charging in effect that your petitioner was under the indictment theretofore mentioned and was fugitive from justice.

That thereupon and on the same day, your petitioner was taken before the said United States Commissioner by said Marshal pursuant to said warrant, and then and there was admitted to bail in the sum of One Thousand (\$1,000) Dollars, and the matter set down for a hearing for the 8th day of November, 1922.

[fol. 74] That on said 8th day of November, 1922 a hearing was had before the said United States Commissioner, and the said Commissioner thereupon summarily found that there existed probable cause to believe that this petitioner was guilty of the charge against him, and thereupon the said Commissioner cancelled the bail of said petitioner and committed the said petitioner to the custody of the said Marshal with directions that said petitioner be imprisoned and detained by the said Marshal until a warrant should issue by a Judge of the Southern District of New York, directing the removal of your petitioner from said Southern District of New York to the District of South Dakota, and thereupon a Warrant of Commitment for said custody was issued by said United States Commissioner and placed in the hands of the said Marshal; that thereupon the said Marshal arrested your petitioner and placed him in custody and restrained him of his liberty and detained him, and does still so imprison and detain your petitioner.

That upon the said hearing had before the said Commissioner, the only evidence introduced against the said petitioner was the complaint of said Assistant United States Attorney Mattuck hereinbefore referred to together with a certified copy of the indictment returned in the United States District Court for the Western Division of the District of South Dakota. The identity of the person charged in the complaint and indictment with your petitioner was admitted.

That your petitioner duly objected to the admissibility of said complaint and indictment as evidence to show probable cause for believing the defendant guilty of any offense against the United States, and particularly of having committed any offense, and especially [fol. 75] pecially the offense charged, within the territorial limits of the Western Division of the District of South Dakota, or within any Division of the District of South Dakota, and your petitioner urged that said indictment and complaint upon its face failed to show or allege that any crime or offense had been committed by your petitioner and especially that any crime or offense had been committed within the territorial limits and jurisdiction of the District of South Dakota, or in any Division thereof, and particularly in the Western Division thereof, and particularly for the following reasons:

I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants

therein named with the commission of any crime or offense against [fol. 76] the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof and that therefor- said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendment- of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offense as may be found to be charged in the indictment is charged to have been committed at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now, for like reasons without power or jurisdiction [fol. 77] diction to take any proceedings under said invalid indictment, and particularly, to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

VII. Subjects to grounds "I, II, III, IV, V and VI" hereof petitioner further states that evidence presented before the said Grand Jury as to all the counts contained in said indictment except Counts 1, 4 and 6 thereof, was insufficient to sustain the indictment for the reasons among others, that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are endorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury there was [fol. 78] introduced and used certain books, and the legal custodian of said books although subpoenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII and VIII" hereof presents the affidavits of Charles H. Rathburn and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IX. That subject to grounds "I, II, III, IV, V and VI" hereof petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding.

X. Subject to grounds "I, II, III, IV, V and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together render it difficult to construe and almost unintelligible; and it so lacks certainty of averment that petitioner ought not to be compelled to respond thereto.

XI. Subject to all of the foregoing grounds the petitioner says that the indictment attempts to charge a scheme by means of fraudulent pretenses, representations and promises, and with the intent to [fol. 79] defraud, to obtain from the persons styled in the indictment as victims certain of their moneys and property by means of inducing them to part with their said property in exchange for shares of stock of the Midland Corporation; said indictment further attempts to charge that the defendants each and all including your petitioner used the Post Office establishment in the United States to transmit to said victims in alleged execution of said scheme the letters sent out in the indictment and petitioner avers that it appears on the face of said indictment that none of said letters was in execution of said alleged scheme, but that said letters showed on their face that when they were written they and each of them referred to acts or things then completed and finished and executed, and therefore incapable of being further executed; and it appears on the face of the indictment that none of said letters made any effort to obtain anything from anyone, nor is it charged that anything was obtained from anyone.

XII. Subject to all of the foregoing grounds, petitioner further says that although the indictment charges nothing but a scheme by such fraudulent means and devices to obtain money and property, and that this was done with intent to defraud, still the indictment nowhere charges that *if* anything was obtained from said victims,

nor does it contain anything to show that the shares of stock of the said Midland Corporation therein referred to were not of the fair and reasonable value of the consideration paid therefor, and particularly [fol. 80] fails to — that anyone whosoever was in fact defrauded by your petitioner or by any of the defendants, whether by means of the said letters or otherwise.

Your petitioner further says that the said commissioner overruled his objections to which petitioner saved his exceptions, and your petitioner now urges the said objections to this Court in support of this petition for writs of habeas corpus and certiorari with the same force and effect as if herein again set forth at length, and urges that the ruling of said commissioner was erroneous.

Your petitioner further says that he offered evidence before said commissioner to prove that he was not guilty in fact of the matters and things charged in said complaint and indictment against him, and that there was no probable cause for believing him guilty of the charge, and also offered evidence to prove that the matters and things alleged in said complaint and indictment did not happen or occur or arise within the District of South Dakota, and particularly within the Western Division thereof, and that the said United States Court within said district had no jurisdiction of the offense; that said commissioner ruled that he could not receive such evidence and refused to hear or consider the same.

Your petitioner further says that the letters complained of concern the affairs of the Midland Packing Company, a corporation organized under the laws of Iowa, and having its plant, offices and records at Sioux City, Iowa, where the said letters are alleged to have been mailed; that a great majority of the stock was sold in Iowa; it is well known in said State that the money derived from the [fol. 81] sale of the stock was honestly administered. That is, your petitioner is informed and believes, prior to the time of the *of the* proceedings in South Dakota which culminated in the indictment now under review, the following matters set forth in said indictment were fully investigated first by the Post Office Authorities and later by the United States Attorney for the District of Iowa, for the Purpose of ascertaining if there existed probable cause to believe that a crime had been committed; that after such investigation had as aforesaid in Iowa the United States Attorney refused to present the Matter to the Grand Jury for the District of Iowa, that at the same time that the indictment was found in South Dakota, as your petitioner is informed and believes, the Grand Jury for the District of Iowa was in session at Sioux City, Iowa, for the hearing of presentments, and no presentment was made to said Grand Jury against your petitioner.

All of the witnesses who appeared before the Grand Jury in South Dakota, as your petitioner is informed and believes were brought into the said jurisdiction from Sioux City Iowa for the express purpose of testifying. The alleged indictment therefore was found in wholly foreign jurisdiction far distant from the home City of your petitioner. That your petitioner was never in the State of

South Dakota at the time that the acts complained of in the indictment are alleged to have been committed.

By reason of the foregoing your petitioner respectfully urges that he is unlawfully detained and restrained of his liberty, and he prays that writs of habeas corpus and certiorari may issue in his behalf, directed to the Marshal of the Southern District of New York, [fol. 82] requiring said Marshal to bring your petitioner before this Court forthwith and to discharge your petitioner from custody.

That no previous application for such writs has been made.

B. I. Salinger, Jr.

Affidavit of B. I. Salinger, Jr., to above paper omitted in printing.

[fol. 83]

EXHIBIT "A" TO PETITION

DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION, DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Affidavit of Charles L. Rathbun Annexed to Petition

DISTRICT OF SOUTH DAKOTA,
County of Brown:

STATE OF SOUTH DAKOTA, ss:

Charles L. Rathbun, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court and appeared and served thereon at said term of court during which term the above entitled case was presented to said grand jury. That he remembers that three young ladies whose names he does not now recollect, appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out through the United States mail; that W. J. Shanard of Bridgewater, [fol. 84] South Dakota, appeared and testified in regard to a letter that he claimed to have received from defendants through the United States Mail; that Martin Christianson of Viborg, South Dakota, appeared and testified that he had received certain letters from the defendants through the United States mail at Viborg, South Dakota; that a post office inspector, I think by the name of Hughes,

appeared and testified in regard to the letters which he produced and as I believe described in the indictment that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and as I believe documents from South Dakota State Securities Commission that said papers were not identified by any witness except said Hughes; that no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of my recollection now, no other recipients of letters described in the indictment testified before the grand jury except the two persons that I have mentioned, Mr. Christianson and Mr. Shanard; the post office inspector might have testified about the other letters described in the indictment but I am not positive as to each letter.

C. L. Rathbun.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public. (Notarial Seal.)

[fol. 85]

EXHIBIT B TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION,
DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Affidavit of Samuel W. Huntington Annexed to Petition

District of South Dakota

STATE OF SOUTH DAKOTA,
County of Brown, ss: .

Samuel W. Huntington, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court and appeared and served thereon at said term of Court during which term the above entitled case was presented to the grand jury. That he remembers that three young ladies whose names he does not now recollect appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out through the United States Mail; that a party whose name is W. J. Shanard of

Bridgewater, South Dakota, to the best recollection of affiant, ap-[fol. 86] peared and testified in regard to a letter which he claimed to have received from defendants through United States Mail; that a party whose name is Martin Christianson of Viborg, South Dakota, appeared and testified that he had received certain letters from defendants through United States mail at Viborg, South Dakota; that a post office inspector, affiant thinks by the name of Hughes appeared and testified in regard to letters which he produced and as affiant believes were described in the indictment that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and affiant believes that documents from the South Dakota States Securities Commission; that said papers were not identified by any witness except the aforesaid inspector whose name affiant recalls as Hughes; that to the best of affiant's knowledge and belief no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of affiant's recollection now no other recipients of letters described in the indictment testified before the grand jury save the two persons mentioned Christianson and Shanard; that the post office inspector may have testified about the letters other than the two Christianson and Shanard described in the indictment but as to that affiant is unable to state positively.

S. W. Huntington.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public, State of South Dakota. (Notarial Seal.)

[fol. 87] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States of America in and for the District of South Dakota do hereby certify that on the 17th day of October, A. D. 1922, there was filed in the above entitled Court, on behalf of the defendant, Fred C. Sawyer in the Case of the United States, Plaintiff, vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., Defendants, Motion to Quash Indictment, that attached to and made a part of said Motion to Quash Indictment is the affidavit of Charles L. Rathbun marked Exhibit "A" and also the affidavit of S. W. Huntington marked Exhibit "B" that I have compared the foregoing copy of said affidavits with the originals thereof, which are in my custody as such clerk, and that such copy is a correct transcript from such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 4th day of November, A. D. 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.

[File endorsement omitted.]

fol. 88] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to said writ alleges as follows:

1. Upon information and belief that May 20, 1922, the grand jurors of the United States of America for the District of South Dakota did present to the United States District Court for the said District an indictment against the said B. I. Salinger, a copy whereof hereto annexed marked "Exhibit A," and which said indictment hereby made part hereof with the same force and effect as if the said indictment were here set forth in full.

fol. 89] 2. That thereafter, upon information and belief, on October 21, 1922, the United States Commissioner sitting in and for the Southern District of New York did issue his warrant directed to our respondent commanding him in the name of the President of the United States of America to apprehend the said B. I. Salinger, who was then and there in the Southern District of New York, and to bring the said Salinger before him, the said Commissioner, at the Post Office Building in the City of New York, to answer to a complaint praying for the removal of the said Salinger to the said District of South Dakota to answer to the indictment aforesaid.

3. That thereafter the respondent duly apprehended the said Salinger within the Southern District of New York.

4. That thereafter on the 15th day of November, 1922, the relator having been arraigned before the said United States Commissioner, was heard in opposition to the said prayer for removal, and at the conclusion of the said hearing the said Commissioner committed the said relator to the custody of your respondent to await an order for the removal of the said Salinger to the said District of South Dakota, there

to await trial, and the said relator was taken into custody by your respondent.

The sources of your deponent's information and the grounds of his belief as to the facts hereinbefore alleged are the records of the United States Commissioner for the Southern District of New York.

Wherefore, deponent prays that the writ of habeas corpus herein may be dismissed and that the said B. I. Salinger be remanded to the custody of the respondent to be dealt with according to law.

William C. Hecht.

Sworn to before me this 11th day of November, 1922. Henry
Straus, Notary Public, N. Y. Co. Clerk's No. 854. (Seal.)

[fol. 90] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

FURTHER RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to the said writ

1. Denies on information and belief the allegations contained in folio 23 of Paragraph XII of the petition herein and more particularly that allegation in the said petition, that the said Commissioner ruled that he could not receive the evidence offered by the said relator and that the Commissioner refused to hear and consider the same.

William C. Hecht.

Sworn to before me this 14th day of November, 1922. Henry
Straus, Notary Public, N. Y. Co. Clerk's No. 854. (Seal.)

[fol. 91] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

RETURN TO WRIT OF CERTIORARI

Before Hon. Samuel M. Hitchcock, United States Commissioner for
the Southern District of New York

UNITED STATES

against

B. I. SALINGER, JR.

1. COMPLAINT

SOUTHERN DISTRICT OF NEW YORK, ss:

Maxwell S. Mattuck, being duly sworn, deposes and says that he is
an Assistant United States Attorney for the Southern District of New
York and on information and belief alleges and charges:

That within the period of three years last past, B. I. Salinger, the
defendant above named, was indicted at Sioux Falls, South Dakota,
for violating certain statutes of the United States, towit, 215 U. S. C.
C. using U. S. mails to defraud.

That an indictment was filed against the said B. I. Salinger in the
aforesaid District of South Dakota;

That since the date of the said indictment the said defendant
Salinger has been a fugitive from justice from the said District of
South Dakota;

That the said defendant Salinger is now within the Southern Dis-
trict of New York, a fugitive from justice as aforesaid; against the
peace of the United States and their dignity and contrary to the form
of the statutes of the United States in such case made and provided.

The sources of deponent's information and the grounds of his be-
lief are a telegram to the United States Marshal for the Southern Dis-
trict of New York from the United States Marshal for the District of
South Dakota.

Wherefore, deponent prays that a warrant may issue for the above
named defendant and that he may be apprehended, bailed or removed
to the said District of South Dakota as the case may be.

[fol. 92] Maxwell S. Mattuck.

Sworn to before me this 21st day of October, 1922. Samuel
M. Hitchcock, U. S. Commissioner, Southern District of
New York.

Approved: M. S. Mattuck, Assistant United States Attorney.

WARRANT

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to their Deputies or any or either of them:

Whereas, complaint on oath hath been made to me, charging that B. I. Salinger, Jr. did within the period of three years prior to the 21st day of October, in the year one thousand nine hundred and twenty-two at the Southern District of South Dakota, use the mails of the United States to defraud; against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said B. I. Salinger, Jr., and bring his body forthwith before me, or some Judge or Justice of the United States, wherever in the Southern District of New York he may be found that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 21st day of October, in the year of our Lord one thousand nine hundred and twenty-two.

Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. William Hayward, United States Attorney.

Endorsed: Warrant to Apprehend. Received this warrant on the 21st day of October, 1922, at New York City, and executed the same by arresting the within named B. I. Salinger, Jr., at New York City on the 21st day of October, 1922, and have his body now in Court, as within I am commanded. William C. Hecht, U. S. Marshal, S. D. of N. Y. Defendant arraigned, bail \$10,000. Hearing adjourned to the 4th day of November, 1922, at ten o'clock, A. M., Paroled for bail. Dated, New York, October 21, 1922. Samuel M. Hitchcock, U. S. Commissioner, Southern District of New York.

[fol.94] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMMITMENT

Before Samuel M. Hitchcock, United States Commissioner

Defendant, 11.8.1922, after having been heard upon the charge against him, ordered, that he be held to answer to the charge and any order of the Court and that he be admitted to bail in the sum of \$5,000 and that he be committed to the custody United States

marshal for the Southern District of New York until such bail is given.

Dated, New York November 8, 1922.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Defendant having given bail, it is ordered that he be released from custody.

Dated, New York.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Bail fixed in the sum of \$10,000. Defendant paroled in custody of counsel until November 9, 1922, 10:30 A. M.

Bail of Commissioner Hitchcock ordered continued until November 9, 1922.

November 6, 1922.

J. W. M., U. S. C. J.

Final Commitment.

[fol. 95] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MINUTES OF HEARING BEFORE COMMISSIONER

Hearing Before Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, at New York, at his office, room No. 314, in the United States Court, Post Office Building, city of New York, on November 8th, 1922, at two-thirty p. m.

Appearances: William Hayward, United States Attorney, by M. S. Mattuck, Assistant United States Attorney, Counsel; Gilbert, Campbell & Barranco, 14 Wall Street, New York City, by Richard Campbell and William McCool, Counsel; Wade H. Ellis, Washington, D. C.

Mr. Mattuck: The Government offers in evidence a certified copy of the indictment found in the Western Division for the District of South Dakota on the 20th day of May, 1922, and bench warrant on that indictment issued in the aforesaid district on the 18th day of October, 1922.

Mr. McCool: The defendant objects to the reception of this indictment in evidence upon the following grounds:

I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United

States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of [fol. 96] South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendment of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offense as may be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly, to arrest, or detain or imprison, your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

[fol. 97] VII. Subject to grounds, "I, II, III, IV, V, and VI" hereof, petitioner further states that evidence presented before the Grand Jury as to all the counts contained in said indictment except

Counts 1, 4 and 6, thereof, was insufficient to sustain the indictment for the reasons, among others, that no person called as a witness before said Grand Jury had any personal knowledge or whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail, or whether they had been delivered to the addresses thereof by mail, and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are endorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury there was introduced and used certain books, and the legal custodian of said books although subpoenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII" and "VIII" hereof presents the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IV. That subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner, or the other defendants of the charge against him or them or make the same clear to the common understanding.

X. Subject to grounds "I, II, III, IV, V and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together render it difficult to construe and almost unintelligible.

Furthermore, the indictment charges a scheme by means of fraudulent pretenses with intent to defraud and in connection with said scheme the use of the Post Office establishment. It appears on the face of the indictment that when the letters were written, the [fol. 98] acts had then been completed and executed and were incapable of being furthered by the use of the mails.

And finally that the indictment does not charge what, if anything, was obtained from the victims named in the indictment and does not show any fraud exercised. The only fraud alleged, referring to the sale of shares of stock of the Midland Corporation, and nothing in the indictment to show that they were not worth the consideration that was paid therefor.

Upon all these grounds, Mr. Salinger claims that the indictment could not be received in evidence, it being wholly void on the face thereof.

The Commissioner: I cannot pass upon any such question as that until the indictment is in evidence.

Mr. McCool: Do you overrule my objection, Mr. Commissioner?

The Commissioner: Yes.

Mr. McCool: I save my exception to that.

The Commissioner: Have you a similar objection to the warrant that has been issued pursuant to the indictment?

Mr. McCool: Precisely. That has not been offered yet.

The Commissioner: Yes, it has been offered.

Mr. McCool: I make the same exception to the warrant, on the ground that it is wholly immaterial and not founded on a valid indictment.

The Commissioner: Your objections are overruled at the present time.

Mr. McCool: I respectfully except.

It is now in evidence, and I move to strike it out on like grounds, both the indictment and the warrant.

The Commissioner: Motion denied.

Mr. McCool: I respectfully except.

Mr. Mattuck: The defendant concedes the identity of the witness.

The Government rests.

Mr. McCool: I move to dismiss the proceedings upon the same grounds which I stated in my objection to the reception of the indictment: No evidence to show that there is any valid indictment and no evidence to show that there is any reasonable cause to show the man is guilty.

[fol. 99] The Commissioner: Unless an indictment is so absolutely bad upon its face that there can be nothing said in its favor, it is held practically in every district, and it has been held in the Supreme Court of the United States, that the proper place to raise each objection is in the forum in which the indictment was found.

I have not had an opportunity to examine this indictment at length. It has only been offered to-day and since it has been offered this morning it has been in the custody of counsel for the defendant and the Commissioner has not even read it.

I understand that this matter is one which is to be expedited and that an application is going to be made to the Court in regard to this indictment and that the ends of the defendant will best be satisfied if he rests now on this motion and my ruling; by having me commit the defendant to the custody of the marshal and then you will make such application in the Courts as you may desire.

Mr. McCool: You rule, then, that your Honor will not receive any evidence that this man is not guilty in fact? Does your Honor want to go into that?

Mr. Mattuck: Yes, we will receive any evidence you want to offer.

Mr. McCool: We cannot offer any to-day. We want reasonable opportunity to present evidence that the man is not guilty in fact.

The Commissioner: One moment. I do not see a great deal that you can do. It is incurring a large expense. If your objections to the indictment are good and valid, they will be upheld by the Court,

and if they are not, the Court will send this matter back to me for further hearing upon your suggestion. Your rights may be saved in that way, whatever rights you may have, but for the purpose of expedition, and you, having been informed that the District Attorney for the demanding district would be here at this time, I think it is only proper that this proceeding should take this course.

Mr. McCool: In other words, the evidence will not be received?

Mr. Mattuck: Just one moment. I will ask the Commissioner not to rule until I have made my statement about the reception of evidence at this time. I would like to make a statement on the record.

The Commissioner: Go ahead.

Mr. Mattuck: When was it you were here with me, Mr. McCool? [fol. 100] Mr. McCool: The 21st of October was the first time.

Mr. Mattuck: No, that you actually came with me to the Commissioner's office?

The Commissioner: That was the 21st of October.

Mr. Mattuck: On the 21st of October, 1922, Mr. McCool came with Government counsel to the office of the United States Commissioner for the purpose of arranging a date mutually convenient to himself and to the Government's counsel for the proceeding with the hearing in this case. At that time and in the presence of the Court, Government's counsel stated to Mr. McCool that the Government would be ready to proceed on Monday, November 6th, with the hearing, at which time the course that the Government would follow would be this: That the indictment would be offered in evidence and that identity of the defendant would be proved, whereupon the Government would rest.

It was also stated at that time by counsel for the Government that Mr. Clark, the District Attorney of the District in which the indictment was found, was coming here and that in order that he may not be put to the inconvenience and expense of remaining in this district over an extended period of time, it was suggested at that time to Mr. McCool that he be prepared on November 6th to go on with the hearing in order that the hearing may be completed within as short a space of time as possible, and that in the event of a commitment by the Commissioner, he would be enabled to procure his writ and have the matter cleaned up within three days.

Mr. McCool at that time stated that November 6th, would be inconvenient for him but that if I would agree to November 8th, the day following Election Day, it would be absolutely agreeable to him to proceed with the hearing at that time, and in the event of a commitment, to have his papers prepared and to go before the Court on a petition for a writ.

Mr. Mattuck, Government's Counsel, at that time stipulated that that was perfectly agreeable; that on November 8th Mr. Clark would be notified to be here, at which time he would be prepared to go on with an- complete the hearing, Mr. Clark coming all the way from South Dakota. Mr. McCool agreed.

Government's counsel now object to any further delay in the going on with this hearing, but does not oppose the admission of any evidence which the defense wished to offer now in rebuttal of the

[fol. 101] presumption of probable cause created by the indictment. The objection of Government's counsel is entirely to delay, a delay which ever effort was made by Government's counsel to forestall ten days ago. Within that period of ten days, it is urged that every effort could have been made by the defense to have procured any witnesses which they desired to rebut probable cause. The objection of Government's counsel, therefore, is not to the admission of evidence, but to a delay and a postponement of this hearing on the grounds stated.

Mr. McCool: Before this morning, it was impossible for the defendant to know what indictment he was called to answer in this District. The indictment was inspected this morning. It now shows an indictment found in the Western Division of the District of South Dakota. I want an opportunity to meet that particular indictment, as we understand another indictment has been found in another Division. There is no desire on the part of the defendant to delay this hearing if the Government is not willing to give us reasonable opportunity to present our witnesses and bring them on and answer this indictment, of course it is impossible to do it today.

I understand that the Commissioner has ruled that that evidence will not be received, to which I save my exception.

The Commissioner: I have not ruled any such way at all and the record will not show it. On the other hand I appreciate that this hearing before me is for the purpose of taking testimony.

I am perfectly familiar with the case of the United States vs. Green, where the action was decided by Judge Brown in the first instance twenty-five years ago, and I certainly never said that I would not receive evidence. But it is a question of when that evidence should be presented.

It is perfectly clear to my mind what happened before me on the 21st of last month. Then the matter was set over until the 4th of November for the reasons stated, that the District Attorney for the demanding district would be here at that time, and it was suggested that you be prepared at that time to go on with the hearing.

If you are not prepared and the Government has made its prima facie case by presenting this indictment, I have overruled your objection to its receipt in evidence, then of course, I have nothing else to do. The Government demands it and having in mind what the arrangements were and also having in mind that you might have [fol. 102] obtained a copy of the indictment by application to the Court in which it was found.

Mr. Mattuck: Not only that. May I state on the record that there was handed to me, Government's Counsel, the date of the original arrest of Mr. Salinger (that was on October 21st or 22nd), a copy of the indictment itself by counsel for the defense. I think that is a clear rebuttal of the argument that they did not know what they were indicted for.

Mr. McCool: We did not know which indictment we were to answer because there was another indictment.

Mr. Mattuck: We are only calling upon counsel to answer the indictment that he would know about.

Mr. McCool: We were told here that another indictment had been found in another division.

[fol. 103] Mr. Mattuck: If your Honor pleases, the Government's Counsel cannot be responsible for everything the defendants have been told. The defendants are being called upon here to answer an indictment, a copy of which they themselves gave me some fifteen days ago.

Mr. McCool: There is not any use of our going ahead with our proofs for just one section of it. It is not going to do the defendant any good until he can bring all his witnesses here.

Mr. Mattuck: You are just attacking the matter here and I do not see any useful purpose in it.

Mr. McCool: We make our offer, if reasonable opportunity is given to us, to prove that we are not guilty of fact. I understand that the Government objects to reasonable opportunity being given.

Mr. Mattuck: The Government objects to an adjournment.

Mr. Campbell: Which is the same thing.

The Commissioner: I do not understand that it is the same thing. You had this indictment before you at the time that this defendant was here and then you were given from the 21st of October until the 4th of November to prepare for this hearing.

Mr. Campbell: Up to this morning, we did not know to which of these Indictments we were going to answer. I understand that there is another indictment.

Mr. Mattuck: I do not understand anything about it. We are not responsible for the understanding of counsel.

The Commissioner: I have passed upon this matter.

Mr. Mattuck: The indictment which you are called upon to answer is the indictment which you have had in your possession for a long time; just how long, I do not know, but certainly from the date of the inception of this hearing.

Mr. McCool: Anything thing that I would like to call your Honor's attention to in support of the reasonableness of my request is this: Part of our proof consists of the books of the company. We are enjoined at this time by the order of the Court, as I understand it, from even looking at those books, much less producing them. We would have to have opportunity to have that order vacated and [fol. 104] bring those books on, so that we could prove our case. It would take at least fifteen days to try this case on its merits.

Mr. Mattuck: In answer thereto, Government's counsel will offer a certified copy of the proceedings that have heretofore taken place in the District of South Dakota, wherever it is. I would like to state on the record, if your Honor please, just what has taken place in this case. Then I will offer the paper itself in evidence, if necessary.

The indictment, as already stated, was found on the 20th day of May, 1922. Two of the defendants, not the defendant Salinger, were arraigned and pleaded to the Indictment on the 17th day of October, 1922. The defendant Salinger was arrested.

Mr. McCool: How is all this relevant on the question of probable cause?

Mr. Mattuck: Not competent at all on the question of probable

cause. The question that you have just raised is the question of whether or not the defendant is to be given reasonable opportunity to produce the books. I am going to show that he has had reasonable opportunity to get books, make motions and everything else.

Mr. McCool: That is not the question here before the Commissioner.

Mr. Mattuck: You just raised the question.

Mr. McCool: The question is whether we shall have reasonable opportunity now.

Mr. Mattuck: The counsel can very well come in three weeks from now and ask for further reasonable opportunity. I am trying to show that reasonable opportunity has been had by counsel for a long time.

Mr. McCool: I cannot see that that is relevant. We have not had reasonable opportunity to produce the evidence on this hearing.

Mr. Mattuck: I have answered that again by stating that ten days—

Mr. McCool: I say that ten days is not enough.

Mr. Mattuck: May I be permitted to finish my argument in answer to his for the purpose of the record?

The Commissioner: Yes, I will not stop you.

Mr. Mattuck: The defendant Salinger gave bail in the District of Iowa, Northern District, on the 13th day of June, 1922. Bond in the sum of \$10,000 was given by the defendant Salinger for appearance in South Dakota. Thereafter the trial date was set for the 17th day of October, 1922, at which time the defendant Salinger [fol. 105] did not conform to the condition of his bond, did not appear in the District of South Dakota for trial, and the bond in that District was thereupon ordered forfeited.

It is, therefore, submitted with regard to the question of a motion for the return of books or whatever argument it was that Mr. McCool made with regard to further time, that such a motion is being interposed here merely for purposes of delay, because reasonable opportunity for the defendant Salinger was given to him between the dates of the filing of the indictment and certainly between the dates of his furnishing bond for his appearance in South Dakota, and the date of trial, to take such steps as he deemed necessary for the purpose of procuring books and other evidence which he deemed necessary. For the purpose of this hearing, it is again submitted that in view of the stipulation entered into between counsel to proceed on this day that no adjournment should be granted at this time.

Mr. McCool: In answer to that, counsel for the defendant very respectfully but very earnestly objects to any statement that he is attempting to delay this proceeding. He states his purposes here are to attempt to aid his client, not to impede the progress of the government.

The Commissioner: Is there any motion before me now?

Mr. McCool: Yes, sir, the motion is for reasonable opportunity to get these books which have been enjoined.

The Commissioner: I take it that that is a motion for an adjournment.

Mr. McCool: Yes, sir.

The Commissioner: I shall deny that motion.

Mr. McCool: I respectfully except.

The defendant offers in evidence what purports to be an affidavit of Mr. S. W. Clark, United States Attorney for the District of South Dakota, verified October 17th, 1922, and a copy of an order of transfer granted by the Honorable James D. Elliott, District Judge of the District Court of the United States for the District of South Dakota, Western Division.

You concede, Mr. Mattuck, that those are true copies?

Mr. Mattuck: Yes. That concession should not be taken to mean that there is no objection to their admission in evidence. Yes, I will concede that they are the affidavits. They bear the original signature of Mr. Clark. They are copies.

Mr. McCool: And that the contents thereof are true?

[fol. 106] Mr. Mattuck: And that the contents are true.

Mr. McCool: The defendant offers in evidence a certified copy of an affidavit of S. W. Clark, verified October 17, 1922.

Mr. Mattuck: No objection to those things going in.

Mr. McCool: And an order of the Honorable James D. Elliott, judge of the United States District Court, District of South Dakota, Western Division, dated October 17th, 1922, transferring the above entitled cause from the Western Division of South Dakota to the Southern Division thereof. I ask that they be marked defendant's Exhibits A and B.

(Marked Defendant's Exhibits A and B respectively.)

Mr. McCool: The defendant rests and now renews his motion to dismiss.

The Commissioner: Motion is denied.

Mr. McCool: To which the defendant respectfully excepts.

The Commissioner: Of course, this brings this matter to a conclusion.

[fol. 107] NOTE.—The Indictment herein, same as Indictment copied at page — of this Transcript.

[fol. 108]

6. BENCH WARRANT

To the Marshal of the United States for the District of South Dakota and to his deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid, on the 20th day of May, A. D., 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file,

and of record in the said Court, may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota to answer the indictment aforesaid; the bail bond of said defendant having been this day forfeited by the Court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 18th day of October, A. D., 1922.

Jerry Carleton, Clerk. (Seal of Court.)

[fol. 109] [File endorsement omitted.]

Warrant returned and filed this 20th day of October, A. D., 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received this Warrant on the 18th day of October, 1922, and after a due and diligent search I am unable to find the within-named defendant, B. I. Salinger, Jr., within this District.

W. H. King, U. S. Marshal, By N. H. Jensen, Deputy.

[fol. 110] (Seal of Court.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of Said Court, at Sioux Falls in said District this 20th day of October, A. D., 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy. (Seal.)

[fols. 111 & 112] DEFENDANT'S EXHIBIT B—Omitted; printed side page 18 ante

[fol. 113] DEFENDANT'S EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

No. 983—W. D.

THE UNITED STATES OF AMERICA, Plaintiff,
against

FRED C. SAWYER, C. H. BURLINGAME & B. I. SALINGER, JR., Defendants

ORDER OF TRANSFER—Filed Oct. 17, 1922

Application having been made by the United States Attorney for the District of South Dakota, for a transfer of the above entitled cause from the Western Division of the District of South Dakota to the Southern Division thereof, said application being presented in open Court and in the presence of the defendant Fred C. Sawyer and of their attorneys, and good cause being shown;

It is now ordered that the above entitled cause be and the same is hereby transferred from the Western Division of the District of South Dakota to the Southern Division of the District of South Dakota, and that all further proceedings herein be had in said Southern Division.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 17th day of October, A. D., 1922.

By the Court:

Attest: Jerry Carleton, Clerk. (Seal of Court.)

[File endorsement omitted.]

[fol. 114] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 23rd day of October, A. D., 1922.

(Signed) Jerry Carleton, Clerk. (Seal of U. S. District Court, Dist. of So. Dakota.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

JUDGE'S CERTIFICATE

I, James D. Elliott, Judge of the District — of the United States, within and for the District afore mentioned, the same being a Court of Record, within and for the District aforesaid, do hereby certify that Jerry Carleton is Clerk of said Court, and was such Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D., 1922.

(Signed) Jas. D. Elliott, Judge of the District Court of the United States for the District of South Dakota. (Seal of the District Court of the United States for the District of South Dakota.)

[fol. 115] UNITED STATES OF AMERICA,
District of South Dakota, ss:

CLERK'S CERTIFICATE TO JUDGE

I, Jerry Carleton, Clerk of the District Court of the United States of America within and for the District aforesaid, do hereby certify that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D., 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

AT A TERM OF THE UNITED STATES DISTRICT COURT HELD IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AT THE COURTHOUSE THEREOF, IN THE BOROUGH OF MANHATTAN, NEW YORK CITY, ON THE 15TH DAY OF NOVEMBER, 1922.

Present: Hon. Julian W. Mack, C. J.

[Title omitted]

ORDER DISMISSING WRITS

The writs of habeas corpus and certiorari heretofore allowed to the above named B. I. Salinger, Jr., having duly come on to be heard before the Honorable Julian W. Mack, Circuit Judge, at a term of this Court, held on the 13th day of November, 1922, and after hearing William P. McCool, of counsel for petitioner, in support of said writs, and Maxwell M. Mattuck, Esq., Assistant United States Attorney, in opposition thereto and due deliberation having been had thereon, on motion of William Hayward, United States Attorney.

Ordered, that said writs be and the same hereby are dismissed.

Enter.

Julian W. Mack, C. J.

[fol, 116] THE UNITED STATES OF AMERICA,
Southern District of New York:

WARRANT OF REMOVAL

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to his Deputies or any or either of them:

Whereas, B. I. Salinger, Jr., has been brought before me upon a commitment made by a United States Commissioner in this District for the purpose of obtaining a warrant for the removal of the said B. I. Salinger, Jr., to the District of South Dakota, in which District the offense for which said prisoner has been so committed is to be tried, a copy of which commitment is hereto attached;

And whereas, the United States Attorney for the Southern District of New York has made application to me under the provisions of the Revised Statutes of the United States, for a warrant for the removal of said prisoner to the District of South Dakota, and an examination of the matter having been made by me;

Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota and there deliver him to the United States Marshal for the District of South Dakota, or some other proper officer authorized to receive said prisoner, in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States for the Southern District of New York, at the Borough of Manhattan, City of New York, this 15th day of November, 1922.

Julian W. Mack, Circuit Judge.

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of B. I. SALINGER, JR.

PETITION FOR APPEAL AND ADMISSION TO BAIL PENDING APPEAL

And now comes B. I. Salinger, Jr., and respectfully represents that on the 13th day of November, 1922, a judgment was entered by this Court dismissing his petition for habeas corpus and certiorari and remanding him in custody of Hon. William Hecht, United States Marshal for the Southern District of New York, awaiting removal to the Western Division of the District of South Dakota.

And your petitioner respectfully shows that in said record proceedings and order in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury of your petitioner all of which will appear more in detail in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed him from said order to the United States Circuit Court of Appeals for the Second Circuit, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal to the said Court, and that the petitioner may have thirty days to prepare and file his bill of exceptions herein.

Gilbert, Campbell & Barranco, Attorneys for Petitioner, 14
Wall Street, New York City.

[fol. 118] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER GRANTING APPEAL AND ADMISSION TO BAIL

On reading of the petition of B. I. Salinger, Jr., for appeal and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is herewith allowed. And it appearing to the Court that a citation was duly served as provided by law, it is ordered that petitioner be admitted to bail pending

the final determination of this appeal in the sum of \$10,000, the appeal to operate as a supersedeas.

Costs bond on appeal is hereby fixed in the sum of \$250.00. Petitioner allowed up to and including December 13, 1922, to make and file his bill of exceptions herein.

New York, November 15, 1922.

Julian W. Mack, Judge.

[fol. 119] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes B. I. Salinger, Jr., by Gilbert, Campbell & Baranco, his attorneys, and in connection with his petition of an appeal, says that in the record and proceedings and order aforesaid, and during the hearing of the above entitled cause in said District Court, error has intervened to his prejudice, and this defendant her assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant, is wrongfully held and illegally imprisoned, and in dismissing his petition and remanding him into custody for removal from the Southern District of New York to the Southern Division of the District of South Dakota.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for removal.

4. The Court erred in dismissing the petition for certiorari.

5. The Court erred in holding that the Commissioner did not err in receiving into evidence, over the objection and exception of petitioner, certified copy of indictment alleged to have been returned against this petitioner and others by the Grand Jury of the Western Division of the District of South Dakota, and in admitting to evidence certified copy of bench warrant founded on said indictment; and furthermore, in refusing to strike out the said indictment and bench warrant upon the motion of petitioner; and the Court erred further in refusing to sustain the exceptions taken by the petitioner before the Commissioner to the Commissioner's ruling admitting the said documents in evidence and in refusing to strike the same out.

[fol. 120] 6. The Court erred in refusing to hold that the said Commissioner was in error in his finding that there was probable

cause to believe that the petitioner was guilty of the commission of any offense against the United States and in particular of the offense attempted to be set forth in the said indictment.

7. The Court erred in refusing to hold that the Commissioner erred in his refusal to afford to the petitioner reasonable opportunity of proving that said petitioner was not guilty in fact of any crime against the United States and particularly of the crime attempted to be set forth in said indictment.

8. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

9. The Court erred in refusing to hold that said Indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants named therein with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any division thereof.

10. The Court erred in refusing to find that said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

11. The Court erred in refusing to find that if any offense against the laws of the United States was charged in and by said indictment at all (the petitioner maintaining that no such offense was so charged), that such facts as are charged show that no offense was committed by the petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of the rights under Section Three of Article Three thereof.

[fol. 121] 12. The Court erred in failing to sustain the petitioner in his protest that said indictment did not charge any offense at all, and if any, none within the jurisdiction of the Court to which said Indictment was returned, and in failing to sustain the petitioner's protest that in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of the District of South Dakota whereas as it appears upon the face of the Indictment said indictment was returned at and by a Grand Jury sitting in and for the Western Division of the District of South Dakota.

13. The Court erred in refusing to hold that by reason of the provisions of Section 53 of the Judicial Code of the United States the said Grand Jury sitting in and for the Western Division of the District of South Dakota was entirely without power or authority to return said indictment and said Court was without power or authority to receive it and that the District Court of the United States for the Southern District of New York was for like reasons without power or jurisdiction to take any proceedings under said invalid indictment and particularly to arrest or detain or imprison your petitioner upon any warrant issued founded upon said indictment and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota and in any event without power to direct the return of your petitioner to the Southern Division of the District of South Dakota in which division in any event no indictment has been found against the petitioner.

14. The Court erred in refusing to hold that the said Grand Jury sitting in and for the Western Division of South Dakota was in any event without power or authority to hear any charge against your petitioner or to return any indictment against him for the reason that said Grand Jury was illegally and unlawfully called and constituted and for the reason, among others, that said Grand Jury was not composed of Citizens of the United States residing within the Western Division of the District of South Dakota, but that many of the members of said Grand Jury resided in other Divisions of the District of South Dakota and that for that reason were and are disqualified from acting upon the Grand Jury sitting in and for the Western Division of South Dakota.

15. The Court erred further in refusing to hold that subject to the foregoing objections that the evidence presented before the Grand Jury as to all the counts contained in said indictment excepting counts 1, 4, and 6 thereof were insufficient to sustain the indictment for the reason, among others, that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay evidence of some or all of the persons whose names are endorsed on the indictment as witnesses before said Grand Jury; and furthermore, said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony and particularly because at the hearing before the Grand Jury there was introduced and used certain books and the legal custodian of said books, although subpoenaed to appear and actually in attendance upon said Grand Jury to testify to the identify and custody of said records was not called as a witness and did not lay the foundation in the introduction or use thereof, as appears more particularly by the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said

indictment, copies of which affidavits were submitted to the Court upon the petition for habeas corpus herein.

[fol. 123] 16. The Court erred in refusing to hold that subject to grounds 1 to — inclusive hereof that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, to- vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and furthermore, that said indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations which defects when taken together render it difficult to construe and almost unintelligible and particularly fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment whether by means of the said letters or otherwise.

17. The Court erred in refusing to hold that the proceedings before the Commissioner *was* improperly conducted and that no proper or sufficient evidence was introduced thereon to establish that there was probable cause to believe the petitioner guilty of any crime and particularly of the alleged crime attempted to be set forth in the said indictment.

18. The Court erred in refusing to find that the Commissioner erred in refusing to dismiss the proceedings before him and in refusing to grant the motion made by petitioner to dismiss the same and the Court erred further in refusing to sustain the petitioner's exceptions to said ruling of said Commissioner.

19. The Court erred in holding that the return made by William C. Hecht, Marshal of the United States for the Southern District of New York to the writ of habeas corpus was sufficient to create an issue and that the facts therein stated were sufficient to justify the said Marshal in detaining your petitioner.

20. The court erred in refusing to hold that the Court had no jurisdiction of the petitioner for the reasons more particularly hereinbefore set forth and in refusing to find that the Commissioner had no power to order the arrest of your petitioner and in refusing further to find that the Marshal was without power to arrest or imprison him, for the reason that the warrant issued by said Commissioner was based solely upon an alleged indictment which was patently and manifestly insufficient to charge any crime as more particularly hereinbefore set forth and therefore said warrant was and is illegal and without justification in law and the arrest made thereunder was unwarranted, unjustified and illegal.

[fol. 124] 21. The Court erred further in finding that the proceeding conducted by the Commissioner was proper and lawful and that the evidence introduced upon the hearing before the Commissioner by the Government was legal evidence and sufficient to estab-

lish there was probable cause to believe the petitioner guilty of any crime.

22. The Court erred further in refusing to sustain the petitioner's exceptions to the Commissioner's refusal to allow petitioner to introduce evidence to establish that he was not guilty in fact, such refusal being based upon the sole ground that the Government urged that to permit of such opportunity would inconvenience the District Attorney for the District of South Dakota without proof upon the part of the Government that the affording of such reasonable opportunity would in any wise prejudice the United States of America.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

Gilbert, Campbell & Barranco, Attorneys for Petitioner and Appellant.

MEMO. AS TO BOND

Approved appeal and supersedeas bail bond filed Nov. 14, 1922 (not printed).

CITATION ON APPEAL—Omitted in printing

[fol. 125] Service of the within citation and receipt of a copy is hereby admitted this 15th day of November, 1922.

William Hayward, U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

M 7-356

[Title omitted]

DOCKET ENTRIES

Attorneys: Gilbert, Campbell & Barranco, 14 Wall St., N. Y. C.
1922.

Nov. 8. Filed Petition for Habeas Corpus and Certiorari and issued Writ—Ret. 11, 13, 22.

" 9. " Bond \$10,000—Southern Surety Co.

" 11. " Affdt. of U. S. Marshal, S. D. of N. Y. as to dismissing Writ.

" 14. " Affdt. of U. S. Marshal, Wm. C. Hecht.

" " " Order dismissing Writs.

" " " Assignment of Errors.

Nov. 14. Filed Petition and Order allowing appeal.
 " " " Writ of Certiorari.
 " " " Writ of H. C.
 " " " Citation on appeal to C. C. A. Ret.
 " 17. " Bond—\$10,000—Southern Surety Co.
 Nov. 8. Filed Bond for Costs \$250—Southern Surety Co.
 Dec. 12. " And Issued Writ of Error.

A true copy. Alexander Gilchrist, Jr., Clerk. (Seal.)

[fol. 126] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ORDER TO CERTIFY RECORD

On reading the annexed præcipe and stipulation dated December 26, 1922, by and between the attorneys for petitioner and the United States Attorney, in the above case, it is

Ordered, that the clerk certify the transcript of record on the appeal taken by the plaintiff from order dismissing writs of habeas corpus and certiorari in accordance with said stipulation and præcipe.

Dated, N. Y., December 27, 1922.

J. W. Mack, U. S. C. J.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated that the clerk of the District Court of the United States for the Southern District of New York may certify the transcript of record on the appeal in accordance with the præcipe hereto annexed.

Dated, December 26, 1922.

Gilbert, Campbell & Barranco, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

Counsel for the respective parties agree that the following and no [fol. 127] other papers constitute the transcript of record:

Indictment, complaint, warrant, commitment, bench warrant, bill of exceptions, petition for leave to appeal, order allowing appeal, assignment of errors, petition for writ of habeas corpus and certiorari, writ of error, orders extending time to file record, writ of habeas corpus, writ of certiorari, return to writs, warrant of removal, order dismissing writs, citation on appeal, præcipe, stipulation on præcipe, order approving præcipe, stipulation re certification, clerk's certificate.

Dated, December 26, 1922.

Gilbert, Campbell & Barranco, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York, this 27th day of December, in the year of our Lord One Thousand nine hundred and twenty-two and of the Independence of the said United States the One hundred and forty-sixth.

Alexander Gilchrist, Jr., Clerk.

[fol. 128] UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing

pages numbered from 1 to 140 inclusive, contain a true and complete transcript of the record on appeal filed in this court in the case of In the Matter of B. I. Salinger, Jr., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit this 13th day of April in the Year our Lord One Thousand Nine Hundred and twenty-three and of the Independence of the United States the One Hundred and Forty-seventh.

(Signed) Wm. Parkin, Clerk. (Seal.)

[fol. 129] EXHIBIT IN EVIDENCE: BOND ON REMOVAL TO THE DISTRICT OF SOUTH DAKOTA—Filed April 20, 1923

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered that on this 20th day of March, in the year of our Lord, one thousand nine hundred and twenty-three, before me Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit, personally came B. I. Salinger, Jr., principal, and Southern Surety Company of Des Moines, Iowa, Surety, and acknowledged themselves to owe to the United States of America, that is to say, the said B. I. Salinger, Jr., the sum of Fifteen Thousand (\$15,000) Dollars, and the said Southern Surety Company of Des Moines, Iowa the sum of fifteen thousand (\$15,000) Dollars separately to be levied and made of their respective goods and chattels, lands and tenements to use of the said United States of America, if default shall be made in the following conditions *following*, to-wit:

Now therefore the conditions of this recognizance are such that if the said B. I. Salinger Jr., shall appear for trial at the District Court of the United States for the District of South Dakota, to be holden at the City of Sioux Falls in said District on the First Tuesday of April, 1923, at 10:30 o'clock in the forenoon of said day, upon an indictment filed in said district, Southern Division, and shall appear before said District Court of the United States for the District of South Dakota, on such day or days thereafter as said District Court may order, and shall at all times render himself amenable to the order and process of the said Court, to answer all such things and matters as shall be objected against him, and not depart the jurisdiction of the Court without leave; and if convicted upon such day as said District Court may order, then this recognizance to be void, otherwise to remain in full force and virtue.

B. I. Salinger, Jr., Principal. Southern Surety Company,
By Hulbert T. C. Beardsley, Attorney-in-Fact. (Seal.)

Acknowledged before me the day and year first above written.
 Alex. Gilchrist, Jr., Clerk of the District Court of the
 United States for the Southern District of New York.
 (Seal.)

A true copy. (Signed Alex. Gilchrist, Jr., Clerk. . (Seal.)

[fol. 130] EXHIBIT IN EVIDENCE: COPY OF ORDER ON MANDATE OF
 U. S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT—
 Filed April 20, 1923

UNITED STATES OF AMERICA,
 Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the
 United States for the Southern District of New York, do hereby
 Certify that the Writings annexed to this Certificate, to-wit Order
 on Mandate, in case of B. I. Salinger, Jr., Miscellaneous Docket
 7/356, filed in this Court on March 16, 1923, have been compared
 by me with their originals on file and remaining of record in my
 office; that they are correct transcripts therefrom and of the whole
 of the said originals.

In testimony whereof, I have hereunto subscribed my name and
 affixed the seal of the said Court at the City of New York, in the
 Southern District of New York, this Second day of April, in the
 year of our Lord, One Thousand Nine Hundred and twenty-three,
 and of the Independence of the said United States the One Hundred
 and Forty-seventh.

(Signed) Alex. Gilchrist, Jr., Clerk.

[fol. 131] AT A STATED TERM OF THE DISTRICT COURT OF THE
 UNITED STATES FOR THE SOUTHERN DISTRICT OF
 NEW YORK HELD AT THE UNITED STATES COURT-
 HOUSE AND POST-OFFICE BUILDING, IN THE BOROUGH
 OF MANHATTAN, CITY OF NEW YORK, ON THE 16TH
 DAY OF MARCH, 1923

Present: Hon. Augustus N. Hand, District Judge.

M. 7-356

[Title omitted]

ORDER ON MANDATE

This cause having heretofore come on for hearing in this Court
 upon writs of habeas corpus and certiorari allowed to the above

named B. I. Sallinger, Jr., and an order having been entered in said cause dismissing said writs, and the said B. I. Salinger, Jr., having thereafter by an appeal obtained a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals having transmitted to this Court its mandate dated March 14th, 1923, by which it appears that, at the October Term of said Court for 1922, this cause came on to be heard and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the order of said District Court be affirmed and that such further proceedings be had in said cause, in accordance with the decision of the said United States Circuit Court of Appeals as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now upon reading and filing said mandate and upon motion of William Hayward, United States Attorney for the Southern District of New York, it is hereby

Ordered, adjudged and decreed that the judgment and order of the said United States Circuit Court of Appeals in this Cause be and the same is hereby made the judgment of this Court, and it is further

[fol. 132] Ordered that the said B. I. Salinger, Jr., personally surrender himself into the custody of the United States Marshal for the Southern District of New York, New York, N. Y., on or before the 19th day of March, 1923, at 10:30 o'clock in the forenoon, and that the said United States Marshal transport the said B. I. Salinger, Jr., to the District of South Dakota, and there deliver the said B. I. Salinger, Jr., into the custody of the United States Marshal for said District, then and there to be dealt with according to law.

(Signed) Augustus N. Hand, United States District Judge.

[fol. 133] EXHIBIT IN EVIDENCE: MINUTE ENTRIES OF U. S. DISTRICT COURT, DISTRICT OF SOUTH DAKOTA—Filed April 20, 1923

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA IN AND FOR THE SOUTHERN DIVISION OF THE DISTRICT OF SOUTH DAKOTA

At a session of the District Court of the United States for the District of South Dakota, continued and held pursuant to adjournment, in the United States Court Room, in the City of Sioux Falls, in the District of South Dakota, on the 3rd day of April, A. D. 1923, the Honorable James D. Elliott, Judge, being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

[Title omitted]

Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the arraignment of the defendant, B. I. Salinger, Jr., and said defendant not appearing in court, and having been three times severally called at the court room door by the United States Marshal to appear in court, as he was bound to do, or forfeit his bond, and having made default said United States District Attorney, S. W. Clark, Esq., moves the Court for the forfeiture of the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, heretofore given for his appearance before this Court at this time; and said United States District Attorney also moves the Court for a bench warrant to issue forthwith for the arrest of said defendant; whereupon, it is Ordered, by the Court, that the hearing on said motions, be and the same is hereby set down for April 4th, A. D., 1923, at two o'clock in the afternoon, and the United States District Attorney is directed to so notify the attorney for said defendant.

And afterwards, to-wit, on the 4th day of April, A. D., 1923, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

THE UNITED STATES, Plaintiff,

vs.

FRED C. SAWYER, CLARENCE H. BURLINGAME, and B. I. SALINGER,
Jr., Defendants.

[fol. 134] This being the time fixed by the Court for hearing, the motion for the forfeiture of the bail of defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, under Indictment No. 1978 S. D., and the matter coming on for hearing, the Court directs the Marshal to call said defendant three times at the door of the court room, the Marshal reports that he has so called the said defendant and that said defendant failed to appear; and the United States District Attorney, S. W. Clark, Esq., having renewed his motion for the forfeiture of the bail bond of B. I. Salinger, Jr., which had heretofore been presented to this Court in the sum of Fifteen Thousand Dollars, conditioned for the appearance of B. I. Salinger, Jr., before this Court on the 3rd day of April, A. D. 1923, at the opening of the Term, the Court states that in his opinion the defendant has not only disregarded his duty under his obligation, as set forth in the terms of this bond to appear here, but that he has resorted to say the least, to most questionable methods; that he has no confidence whatever in the position assumed by counsel for defendant that this defendant could by collusion with a bonding company go to a distant jurisdiction and surrender himself there and

that a United States Commissioner could fix a bond of \$5,000.00, the terms of which are entirely unknown to this jurisdiction at this time, and thereby relieve him from the necessity of fulfilling the obligation of this bond by surrendering himself here for trial; whereupon, it is Ordered by the Court, that the bail bond of said defendant, B. I. Salinger, Jr., in the sum of *Fifteen Thousand Dollars*, conditioned as above stated be, and the same is hereby forfeited; and it is further Ordered that the Clerk of this Court file the telegrams presented by the United States Attorney relating to the present whereabouts of said Defendant.

And, to-wit, on the same day, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

[Title omitted]

[fol. 135] Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the Court for the issuance of a bench warrant for the arrest of B. I. Salinger, Jr., by reason of the forfeiture of his bond, and the fact that he is under indictment and has not responded; whereupon, it is Ordered by the Court, that a warrant issue forthwith for the arrest of the said defendant, B. I. Salinger, Jr., returnable forthwith at Sioux Falls, South Dakota.

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that the above and foregoing are true copies of the entries made upon the Journal of the proceedings of said Court, in the case therein entitled; that I have compared the same with the original entries thereof, and the same is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said Court, at Sioux Falls, this 5th day of April, A. D., 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy
(Seal.)

[fol. 136] EXHIBIT IN EVIDENCE: BENCH WARRANT—Filed April 20, 1923

UNITED STATES OF AMERICA,
District of South Dakota:

To the Marshal of the United States for the District of South Dakota and to his deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid on the 20th day of May, A. D., 1923, the Grand Jurors in and for the said District of South Dakota

brought into the said Court, a true bill of indictment against, B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid, the bail bond of said defendant having been this day forfeited by order of the Court.

Witness, The Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 4th day of April, A. D., 1923.

(Sgd.) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal of Court.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received the within Warrant on the 4th day of April, 1923, and after a due and diligent search I am unable to find the within-named Defendant Ben I. Salinger, Jr., within this District.

W. H. King, United States Marshal, By N. H. Jensen,
Deputy.

[fol. 137]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 5th day of April, A. D., 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal.)

[fol. 138] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF LOUISIANA

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his deputies or any or either of them:

Whereas: Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner for the purpose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota, in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

And whereas the Assistant United States Attorney for the Eastern District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me: Now, Therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States, for the Eastern District of Louisiana, at the City of New Orleans, this 26th day of April, 1923.

(Signed) Rufus E. Foster, Judge.

[fol. 139]

FINAL MITTIMUS

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the keeper of the House of Detention in the city of New Orleans, Greeting:

Whereas, Ben I. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May 1922,

in said District, in violation of Sec. 215 C. C. of the United States, unlawfully use the mail with a scheme to defraud,

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben I. Salinger, Jr., committed said offense as charged, I have directed that said Ben I. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 day of April 1923 and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben I. Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you, the Keeper of said Jail of said City, to receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District, this 18 day of April A. D. 1923

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal)

Received this Mittimus with the within named Prisoner, on the 8 day of April A. D. 1923, and on the same day I committed the said Prisoner to the custody of the Jail Keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated April 18, 1923.

(Signed) Victor Loisel, United States Marshal, Eastern District of Louisiana, By ———, Deputy.

[fol. 140] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 17238

[Title omitted]

RETURN OF COMMISSIONER TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA IN RESPONSE TO THE WRIT OF CERTIORARI ISSUED OUT OF SAID COURT ON THE 18TH DAY OF APRIL, 1923—Filed April 20, 1923

Comes now Arthur H. Browne, United States Commissioner for the Eastern District of Louisiana, and in response to the writ of certiorari to him directed by the Honorable Rufus E. Foster, Judge of said District Court, of date April 18th, 1923, shows the following

proceedings had before him as such Commissioner in the above matter.

April 6th, 1923.—Verified complaint filed by L. P. Bryant, Jr., Assistant United States Attorney for the Eastern District of Louisiana, same being hereto attached together with a certified copy of the indictment referred to in said complaint.

April 6th, 1923.—Warrant of arrest issued and placed in hands of Marshal for service, same being hereto attached.

April 6th, 1923.—Defendant B. I. Salinger, Jr., was brought before me by the United States Marshal for the Eastern District of Louisiana, under the warrant of arrest above specified, and arraigned whereupon he applied for bond and bond for his appearance was fixed in the sum of \$15,000. Defendant gave bond for his appearance before me in said sum \$15,000, and the case was subsequently fixed for hearing before me on April 16th, 1923, at 11:00 a. m. and thereafter the hearing was continued by me to April 18, 1923 owing to the fact that the accused was unable to be present.

Plaintiff appeared through L. P. Bryant, Jr., Assistant United States Attorney for the Eastern District of Louisiana, and S. W. [fol. 141] Clark, United States Attorney for the District of South Dakota, and defendant appeared, in person, and by his attorney, St. Clair Adams, and the following proceedings were had:

Defendant made an application for a continuance but upon objection to same by Plaintiff and no good cause being shown for continuance, motion was denied:

Plaintiff offered in evidence the certified copy of the indictment returned by the Grand Jury for the District of South Dakota, attached to the complaint and hereinbefore referred to. No objection on the part of the defendant and same was received.

Plaintiff offered in evidence certified copy of bench warrant issued by Honorable James D. Elliott, United States District Judge, District of South Dakota, of date April 4th, 1923. No objection and same was received in evidence and is hereto attached.

Request being made of defendant's attorney as to whether he would admit defendant's identity, he refused to admit identity and thereupon oral evidence was received proving the identity of defendant with the person named in the indictment, and documentary evidence in the form of a certified copy of the petition for writ of habeas corpus theretofore filed in the United States District Court for the Eastern District of Louisiana by the defendant, B. I. Salinger, Jr., wherein he declares himself to be one and the same party as the B. I. Salinger, Jr. referred to in the indictment returned by the [fol. 142] Grand Jurors for the District of South Dakota, certified copy of which said petition for writ of habeas corpus is hereto attached and made part of this return.

After reception of the above evidence the Government rested its case.

The defendant did not offer any evidence, and it appearing to the Commissioner that there is probable cause to believe that a public offense has been committed, as specified in the complaint and indictment, and that the defendant, B. I. Salinger, Jr., is guilty

thereof, thereupon, it was, by the Commissioner ordered, that the said B. I. Salinger, Jr., be committed to the District Court for the Eastern District of Louisiana, to await further action by said court in accordance with law.

A commitment was thereupon issued in the form of the copy hereto attached, and delivered to the United States Marshal for the Eastern District of Louisiana, for the detention of the said B. I. Salinger, Jr.

Neither party requested stenographic notes as to oral testimony taken and record was not kept thereof.

The foregoing, together with the Exhibits hereto attached, constitutes a full and complete record of the proceedings had before me in the above entitled matter, all of which is herewith transmitted to the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana in response to the writ of certiorari to me directed.

Given under my hand and seal, this 18th day of April, 1923.

(Signed) A. H. Browne, U. S. Commissioner. (Seal.)

[fols. 143-148] UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF LOUISIANA

No. 17238

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Omitted; printed side p.
2 ante

[fols. 149 & 150] ORDER ISSUING WRIT—Omitted; printed side p.
8 ante

[fol. 151] FINAL MITTIMUS—Omitted; printed side page 9 ante

[fol. 152] WARRANT

UNITED STATES OF AMERICA,
District of South Dakota:

To the Marshal of the United States for the District of South Dakota
and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States for
the District of South Dakota, begun and held at Deadwood, within

and for the District aforesaid, on the 20th day of May, A. D. 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud as by said indictment now remaining on file, and of record in the said Court may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid, the bail bond of said defendant having been this day forfeited by order of the court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, an- my ha-d and seal of said Court, at Sioux Falls this 4th day of April A. D. 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal of Court.)

[fol. 153] UNITED STATES OF AMERICA,
District of South Dakota:

Received the within Warrant on the 4th day of April, 1923, and after a due and diligent search I am unable to find the within-named Defendant Ben I. Salinger, Jr., within this district.

W. H. King, United States Marshall, By N. H. Jensen,
Deputy.

[fol. 154]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls in said District this 5th day of April A. D. 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal.)

[fol. 155] UNITED STATES COURTS,
Eastern District of Louisiana,
City of New Orleans, ss:

BOND

Be it Remembered, That on this 6th day of April, 1923, A. D., before me, Henry J. Carter, a Clerk of the District Court of the United States for the said Eastern District of Louisiana, personally came B. I. Salinger, Jr., residing at Sioux City, Iowa, as Principal, American Surety Company a Corporation, as Surety, of New York, and, jointly and severally acknowledged themselves to owe the United States of America the sum of Fifteen Thousand (\$15,000.00) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the conditions following, to wit:

The Condition of the Recognizance is such, that if the said B. I. Salinger, Jr., shall personally appear before the United States Commissioner for the Eastern Dist. of La., in and for the District aforesaid, at New Orleans, La., at 11 A. M., on the 16 day of April A. D. 1923, and from day to day thereafter until lawfully discharged, and then and there to answer the charge of having, on or about the — day of — within said District, in violation of Section 215 C.C. of the Revised Statutes of the United States, unlawfully and then and there abide the judgment of the said Court and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

(Signed) B. I. Salinger. [L. S.] (Signed) American Surety Company of New York, By Chas. Hoffman, Resident Vice-Pres. Attest: F. M. Cobb, Resident Assistant Secretary. (Seal.)

Taken and acknowledged before me on the day and year first above written.

(Signed) H. J. Carter, Clerk U. S. District Court, E. D. of La.

(Signed) H. C. Moseley, (Signed) W. L. Brown, Notaries (Seal.)

—— — a surety on the annexed recognizance, being duly sworn, deposes and says that he resides in the City of New Orleans in said District, that he is worth the sum of — Dollars, over and above all his just debts and liabilities, in property subject to execution and sale.

(Affiant's Signature:) — — —

Sworn to and subscribed before me, this 6 day of April, A. D. 1923. (Signed) A. H. Browne, U. S. Commissioner for the Eastern District of La.

[fol. 155a] UNITED STATES OF AMERICA,
Eastern District of Louisiana:

No. 7554.

Affidavit by L. P. Bryant, Jr.

UNITED STATES

vs.

BEN I. SALINGER, JR.

WARRANT

The President of the United States of America to the U. S. Marshal for the Eastern District of Louisiana, or either of his lawful deputies, Greting:

You are hereby commanded to take and apprehend and bring before me the body of Ben I. Salinger, Jr., at my office then and there to answer to a charge on affidavit hereto annexed made against said Ben I. Salinger, Jr., per notary Sec. 215 C. C. And what you do in the premises make return to me.

Witness my hand in the City of New Orleans, State of Louisiana, this 6 day of Apl. 1923.

(Signed) A. H. Browne, United States Commissioner.
(Seal.)

[fol. 156] UNITED STATES OF AMERICA,
Eastern District of Louisiana,
New Orleans Division, ss:

No. 7554

AFFIDAVIT OF L. P. BRYANT, JR.

Before me, Arthur Horace Browne, a United States Commissioner for the Eastern District of Louisiana, New Orleans Division, personally appeared this day L. P. Bryant, Jr. who being first duly sworn, deposes and says that on or about the 20th day of May A. D., 1922, at Sioux Falls, South Dakota, in the Western District of South Dakota, an indictment was duly filed by the Grand Jury endorsed as number 983 of the Docket of the United States District Court court for said District in which are Ben I. Salinger Jr. was made defendant and charges with others therein named with having devised a certain scheme to defraud and in the execution thereof with having unlawfully feloniously and knowingly caused to be mailed and delivered by United States Mail certain numerous letters described in the various Courts of said indictment all in violation of Sec. 215 of

the United States Criminal Code, which said indictment is referred to as part hereof, that the said Salinger is a fugitive from Justice and now within the Eastern District of Louisiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Deponent further says that he has reason to believe and does believe that S. W. Clark *are* material witnesses to the subject matter of the complaint.

(Deponent's signature:) (Signed) L. P. Bryant, Jr. (Seal.)

Sworn to before me, and subscribed in my presence, this 6 day of Apr. A. D. 1923. (Signed) A. H. Browne, United States Commissioner. [Seal.]

[fol. 157] PETITION FOR APPEAL AND ORDER—Filed Apr. 27, 1923

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

The undersigned petitioner, B. I. Salinger, Jr., feeling himself aggrieved by the proceedings, orders and rulings had in the District Court of the United States for the Eastern District of Louisiana, in a case therein pending, entitled "In the Matter of the Petition of B. I. Salinger, Jr., for writs of habeas corpus and certiorari," and numbered therein 17238 and particularly by an order of said Court rendered and entered therein on the twenty-sixth day of April, A. D. 1923, ordering that the writs of habeas corpus and certiorari heretofore issued therein on behalf of said petitioner be dismissed, and dismissing the same, hereby prays that an appeal by writ of error from said judgment may be allowed to him to the said Supreme Court of the United States, in accordance with law and the rules and practices of said Supreme Court and that upon the service of citation, the said appeal may operate as supersedeas until the final disposition of the case by the Supreme Court of the United States.

[fol. 158] And in support of this petition, your petitioner herewith presents and files his assignments of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner. (Signed) St. Clair Adams,
His Attorney.

[fol. 159] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day, this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal by Writ of Error to the Supreme Court of the United States for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith,

It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana, to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served and returned in accordance with law.

[fol. 160] And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States, and that to effect said supersedeas the said B. I. Salinger, Jr., shall enter into an undertaking in the sum of One Hundred Dollars, with sureties to be approved by this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of a supersedeas bail bond in the penal sum of Fifteen thousand Dollars, with sureties to be approved by the Clerk of the United States District Court conditioned for the appearance and surrender of the said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said Court and not depart the same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at New Orleans, La., this 27th day of April, A. D., 1923.

(Signed) Rufus E. Foster, Judge United States District Court, Eastern District of Louisiana.

[fol. 161] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 27, 1923

Now comes the petitioner above named and in connection with petitioner for appeal by Writ of Error, in the above entitled cause, files herewith his Assignment of Errors which he says occurred in the

proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings therein had and entered; and says that there was and is manifest error appearing upon the face of the record, and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal; and in dismissing the petition for certiorari—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into custody for removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

[fol. 162] 2. The court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred especially in ordering the removal of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of Section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, through it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed, and to transfer for trial to the division in which it is charged the offense was committed—wherefore, the Court erred, in any view in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota in which it is charged the offense was committed.

5. The Court erred in following the *Biggerstaff v. U. S.* (C. C. A.) 260 Fed. p. 926, which in passing upon the provision of said Section 53, that “all prosecutions shall be had in the Division in which committed,” erroneously construes the said word “prosecutions” to mean “trial,” when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division wherein it is charged the offense was committed; and said decision is in opposition to the decision of [fol. 163] the Supreme Court of the United States in *Post v. U. S.* 161 U. S. 583; 16 Sup. Ct. 611; *Virginia* 148 U. S. 107; 13 Sup. Ct. 536; and *Chennault v. U. S.* 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and as well, contrary to reason.

6. The Biggerstaff case should not have been followed for the further reason that it proceeds in contradiction of the rule that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 215.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth Amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the court erred because it disregarded the decision in *Stever v. U. S.* 222, U. S. 167, and in *U. S. v. Stewart*, (C. C. A.) 119, Fed. 89; and *U. S. v. Conrad*, 59 Fed., 485, and disregarded the provisions of the fifth and sixth amendments to and section three of Article three of the Constitution of the United States.

[fol. 164] 9. The court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two coindictes, and in failing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by any of the letters counted on other than those which it is charged he, himself, wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint actions by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it is to be said that in the *Stever* case, there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment be assumed, the only overt acts charged to be in execution of the scheme or conspiracy is mailing, etc., at Sioux City, Iowa.

13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the Pleader that these letters were in execution or attempted execution of the scheme and artifice described in the indictment; and it erred in failing and refusing to [fol. 165] hold that said letters and each of them showed on their

face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged scheme, for in that, the indictment charges said sales to be part of the scheme and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the court in acting under it deprived petitioner of the rights guaranteed to him by the eighth amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

[fol. 166] 18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any fact sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegation, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomever was in effect defrauded by your petitioner or by any of the defendants named in said indictment whether by means of the said scheme and said letters or otherwise.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

(Signed) St. Clair Adams, Attorney for Plaintiff in Error

[fol. 167] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT
OF LOUISIANA

New Orleans, Thursday, April 26th, 1923.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, Judge.

[Title omitted]

JUDGMENT

Extract from the Judgment Book, February Term, 1923

This cause came on at a former day to be heard upon the application of the relator for a writ of habeas corpus herein and after hearing the pleadings and the evidence and testimony offered on behalf of the respective parties, and arguments of counsel the cause was submitted when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the reasons of the Court orally assigned;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the application of the relator for a writ of habeas corpus be, and the same is hereby denied, that the said petition of the relator be dismissed with costs and that the said relator, Ben. I. Salinger, Jr., be remanded to the custody of Victor Loisel, United States Marshal, for this District.

Judgment rendered April 26th, 1923.

Judgment signed, April 26th, 1923.

(Signed) Rufus E. Foster, Judge.

[fol. 168] UNITED STATES DISTRICT Ct., EASTERN DISTRICT OF
LOUISIANA

No. 17238

[Title omitted]

PRÆCIPE FOR APPELLANT—Filed May 3, 1923

To the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

SIR:

You will please incorporate in the transcript of appeal to the Supreme Court of the United States, in the above entitled and numbered cause, the following:

1. Petition for writ of habeas corpus.

2. Return of the Marshal to said petition.
3. Certified copy of the indictment.
4. Certified copy of the application for an order of transfer of the cause from the Southern Division of the District Court of the United States for the District of South Dakota, to the Western Division of said District.
5. The note of evidence taken in these proceedings on the 20th day of April, 1923, containing the evidence of Fred C. Sawyer, C. H. Burlingame, B. I. Salinger, Jr., and T. I. Galbreath.
6. Copy of the Government's motion praying for an order of removal of B. I. Salinger, Jr. and copy of the commitment attached thereto.
7. Return of Arthur H. Brown, United States Commissioner, to the writ of certiorari, and all of the papers annexed to said return.
8. Judgment.
9. Petition for appeal to the Supreme Court of the United States.
10. Order of the Court allowing appeal with supersedeas.
11. Assignment of errors.

Yours truly, (Signed) St. Clair Adams, Attorney for Appellant.

[fols. 169-173]

CLERK'S CERTIFICATE

Clerk's Office

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, do hereby certify that the foregoing 168 pages contain and form a full, true, complete and perfect transcript of the record, assignment of errors and all proceedings in the case of United States ex rel. B. I. Salinger, Jr. versus Victor Loisel, United States Marshal, 17238 of the Docket of this Court, as made up in accordance with *Præcipes* for Transcript copied therein.

Witness my hand and the seal of said court at the City of New Orleans, La., this 21st day of May, A. D. 1923.

H. J. Carter, Clerk. [Seal of the U. S. District Court for the Eastern Dist. of La., N. O. Div.]

Citations and Services omitted in printing.

Endorsed on cover: File No. 29,647. E. Louisiana D. C. U. S. Term No. 342. B. I. Salinger, Jr., appellant, vs. Victor Loisel, United States Marshal for the Eastern District of Louisiana. Filed May 24th, 1923. File No. 29,647.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 705

B. I. SALINGER, JR., PETITIONER,

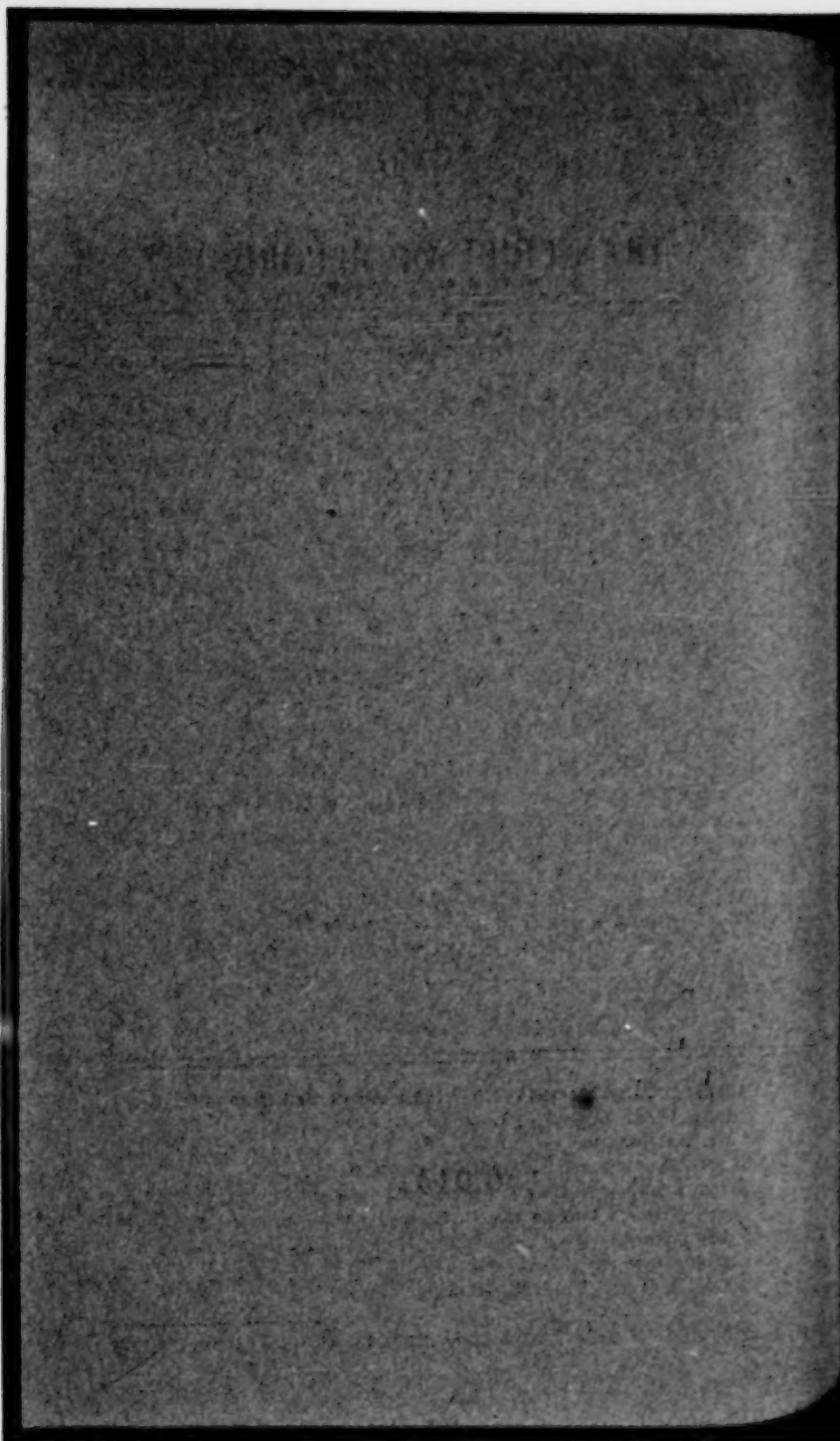
vs.

**THE UNITED STATES OF AMERICA AND VICTOR LOISEL,
AS UNITED STATES MARSHAL, EASTERN DISTRICT OF
LOUISIANA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

CERTIORARI AND RETURN FILED DECEMBER 19, 1933

(30,015)



(30,015)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 705

B. I. SALINGER, JR., PETITIONER,

vs.

THE UNITED STATES OF AMERICA AND VICTOR LOISEL,
AS UNITED STATES MARSHAL, EASTERN DISTRICT OF
LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA:

**UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
JUDICIAL CIRCUIT**

[Caption omitted]

[fol. 1] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT

In the Matter of the Petition of B. I. SALINGER, JR., for Writ of
Habeas Corpus

B. I. SALINGER, JR., Plaintiff,

versus

THE UNITED STATES OF AMERICA and VICTOR LOISEL, as Marshal of
the United States for the Eastern District of Louisiana, Defend-
ants.

PETITION FOR APPEAL—Filed May 1, 1923

To the Honorable the United States Circuit Court of Appeals for the
Fifth Circuit:

The undersigned petitioner, B. I. Salinger, Jr., feeling himself
aggrieved by the proceedings, orders and rulings in the United States
[fol. 2] District Court for the Eastern District of Louisiana, in a case
pending therein entitled "In the Matter of B. I. Salinger, Jr., for
Writ of Habeas Corpus," and numbered therein 17243, and particu-
larly by the judgment of said Court discharging petitioner's petition
for writ of habeas corpus and remanding petitioner to the custody of
the United States Marshal, and by the refusal by said Court to allow
petitioner an appeal to the United States Circuit Court of Appeal for
the Fifth Circuit, with supersedeas upon a petition therefor duly
presented to said Court on the 28th day of April, A. D. 1923.

And your petitioner having been refused an appeal with super-
sedeas by said Court from its judgment discharging said writ of
habeas corpus and remanding your petitioner, hereby prays, under
Section 132 of the Judicial Code (Comp. St. sec. 1124) which reads
as follows:

"Any judge of a Circuit Court of Appeals, in respect of cases
brought or to be brought before that Court, shall have the same
powers and duties as to allowances of appeals and writs of error, and
the conditions of such allowances, as by law belong to the justices or
judges in respect of other Courts of the United States, respectively."

that an appeal by writ of error from said judgment discharging said
writ of habeas corpus and remanding your petitioner in accordance
with law and the rules and practices of said United States Circuit

Court of Appeals and that upon the service of citation the said appeal may operate as a supersedeas until the final disposition of the case by the United States Circuit Court of Appeals.

And in support of this petition your petitioner herewith presents [fol. 3] and files his assignment of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner, By St. Clair Adams, His Attorney.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal to the United States Circuit Court of Appeals for the Fifth Circuit for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith,

[fol. 4] It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana to the United States Circuit Court of Appeals for the Fifth Circuit, as applied for in said petition, and that said appeal and citation thereof be issued, served and returned, in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the United States Circuit Court of Appeals, and that to effect said supersedeas the said B. I. Salinger, Jr., shall enter into an undertaking in the sum of Five Thousand (\$5,000.00) Dollars, with sureties to be approved by the Clerk of this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of supersedeas bail bond in the penal sum of Five Thousand (\$5,000.00) Dollars, with sureties to be approved by the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., in open Court, before the United States Circuit Court of Appeals for the Fifth Circuit, and that he shall abide the further order of said Court and not depart same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at Huntsville, Alabama, this 30th day of April, A. D. 1923.

R. W. Walker, United States Circuit Judge, Presiding Judge
United States Circuit Court of Appeals.

[fol. 5] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the petitioner above named in connection with his petition for appeal by Writ of Error in the above entitled cause, files herewith his Assignment of Errors which he says occurred in the proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings therein had and entered; and says that there was and is manifest error appearing upon the face of the record and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into custody for removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

[fol. 6] 2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred especially in ordering the record of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of Section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed and to transfer for trial to the Division in which it is charged the offense was committed—wherefore, the Court erred, in any view, in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota, in which it is charged the offense was committed.

5. The Court erred in following *Biggerstaff v. U. S. (C. C. A.)* 260 Fed. p. 926, which in passing upon the provision of said section 53, that "all prosecutions shall be had in the Division in which committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division where it is charged the offense was com-

[fol. 7] mitted; and said decision is in opposition to the decision of the Supreme Court of the United States in *Post v. U. S.*, 161 U. S. 583; 16 Sup. Ct. 611; *Paul v. Virginia*, 148 U. S. 107; 13 Sup. Ct. 536; and *Chennault v. U. S.*, 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and, as well, contrary to reason.

6. The *Biggerstaff* case should not have been followed for the further reason that it proceeds in contradiction of the rule that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 245.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth Amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the Court erred because it disregarded the decision in *Stever v. U. S.* 222 U. S. 167, and in *U. S. v. Stewart* (C. C. A.) 119 Fed. 89; and *U. S. v. Conrad*, 59 Fed. 485—and disregarded the provisions of the fifth and sixth amendments to and section three of Article three of the Constitution of the United States.

[fol. 8] 9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two co-indictees, and in filing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by any of the letters counted on other than those which it is charged he, himself, wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it is to be said that in the *Stever* case there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment

be assumed, the only overt acts charged to be in execution of the scheme or conspiracy in mailing, etc., at Sioux City, Iowa.

13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the pleader that these letters were in execution or attempted execution of the scheme and artifice [fol. 9] described in the indictment; and it erred in failing and refusing to hold that said letters and each of them showed on their face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged scheme, for in that, the indictment charges said sales to be part of the scheme, and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the Court in acting under it deprived petitioner of the rights guaranteed to him by the Eight- Amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

[fol. 10] 18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegations, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment, whether by means of the said scheme and said letters or otherwise.

19. That the Court erred in ordering the issuance of said warrant or removal, in that said warrant of removal was predicated upon a commitment of Arthur H. Brown, Esquire, United States Commissioner and the legality of which commitment and the indictment upon which it was founded were attacked heretofore in two petitions for writs of habeas corpus; that the petition of petitioner for habeas corpus having been dismissed by the Court, and your petitioner remanded, and the Court hereafter having allowed petitioner appeals from said judgments dismissing his petition for habeas corpus with supersedeas to the Supreme Court of the United States, the Court erred in issuing said warrant of removal of petitioner from the Eastern District of Louisiana to the Southern District of South Dakota, and erred in refusing to hold that said appeals with supersedeas had [fol. 11] the effect of staying said order of removal pending the determination *that said appeals with supersedeas had the effect of staying* States, particularly as said order of removal was bottomed on the same indictment and the same commitments of the aforesaid United States Commissioner involved in said previous habeas corpus proceedings appealed as alleged aforesaid to the Supreme Court of the United States; that the Court erred in refusing to hold that said appeals, involving as they do the identical questions and issues, jurisdictional and constitutional, they are presented by petitioner here, had the effect of rendering inoperative and nugatory said warrant of removal.

20. That the Court erred in dismissing the petition of petitioner for habeas corpus to inquire into the validity of petitioner's detention and imprisonment under said warrant of removal, because the indictment, commitments and proceedings upon which said warrant of removal was founded were all involved in the said previous habeas corpus proceedings and the effect of the allowance of said appeals and supersedeas to the Supreme Court of the United States from said orders dismissing said petitions was to suspend, stay and render inoperative said order of removal and to prevent the removal of petitioner from the Eastern District of Louisiana to the Southern District of South Dakota pending the determination of said appeals to the Supreme Court of the United States that the Court erred in holding under these circumstances, and it had the power and jurisdiction to issue and make executory said warrant of removal.

21. That the Court erred in issuing said warrant of removal and in giving effect thereto after the aforesaid appeals with supersedeas [fol. 12] were taken to the Supreme Court of the United States, for the reason that the legal effect of said appeals and supersedeas bonds was to supersede the said warrant of removal rendering the same nugatory and putting it beyond the power and jurisdiction of the Court to order its execution, and the restraining and imprisonment of petitioner thereunder. The Court furthermore erred in refusing to hold that the issuance and giving effect to said warrant of removal, under which petitioner is restrained of his liberty, after said appeals and supersedeas to the Supreme Court of the United States were allowed and perfected, was in violation of the constitution of

the United States and in violation of the statutes of the United States and beyond its power and jurisdiction.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

St. Clair Adams, Attorney for Plaintiff and Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BOND ON APPEAL

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America and Victor Loisel as Marshal thereof for the Eastern District of Louisiana the full and just sum of Five Thousand and no/100 (\$5,000.00) dollars to be paid to the said United States of America and Victor Loisel as Marshal thereof for the Eastern District of Louisiana, certain attorney, executors, administrators or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of May in the year of our Lord, one thousand nine hundred and twenty-three.

[ol. 13] Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between B. I. Salinger, Jr., plaintiff, and the United States of America and Victor Loisel as Marshal thereof for the Eastern District of Louisiana, defendants, judgment was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., having obtained an order of appeal and a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America and Victor Loisel as Marshal of the United States for the Eastern District of Louisiana, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said B. I. Salinger, Jr., shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

(Signed) B. I. Salinger, Jr. (Seal), By St. Clair Adams, His Attorney (Seal). American Surety Company of New York (Seal), (Signed) By Hilton Sandoz (Seal), Resident Vice-President. Attest: (Signed) E. N. Cowl, Resident Assistant Secretary.

[ol. 14] Approved by—

(Signed) Frank H. Mortimer, Clerk of the U. S. Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BAIL BOND

Know all men by these presents:

That we, B. I. Salinger, Jr., as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Five Thousand Dollars, to be paid to the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of May, A. D. 1923.

Whereas, lately, at the February Term, A. D. 1923, of the District Court of the United States for the Eastern District of Louisiana, in a suit pending in said Court between B. I. Salinger, Jr., plaintiff and Victor Loisel, U. S. Marshal for the Eastern District of Louisiana, defendant, a judgment and sentence was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., has obtained an order of appeal from the United States Circuit Court of Appeals, to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the said Victor Loisel, U. S. Marshal, as aforesaid, to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

[fol. 15] Now the condition of the above obligation is such that if the said B. I. Salinger, Jr., shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held in the City of New Orleans, on the third Monday in November, A. D. 1923, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

(Signed) B. I. Salinger, Jr., By St. Clair Adams, His Attorney. American Surety Company of New York.

(Signed) By Hilton Sandoz (seal). Resident Vice-President. Attest: (Signed E. N. Cowl, Resident Assistant Secretary.

Approved:

(Signed) Frank H. Mortimer, Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

[fol. 16] CITATION—Omitted in printing; Filed May 4, 1923

[fol. 17] UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
CIRCUIT

No. 4088

B. I. SALINGER, JR., Appellant,

vs.

THE UNITED STATES OF AMERICA and VICTOR LOISEL, United States
Marshal for the Eastern District of Louisiana, Appellees

SERVICE

Received by U. S. Marshal, New Orleans, La., May 4, 1923, and on the same day, month and year I served certified copy hereof on Victor Loisel, U. S. Marshal by handing same to his chief deputy U. S. Marshal, A. A. Schnexnaydre, in person in the office of the U. S. Marshal, in New Orleans, Louisiana.

Victor Loisel, U. S. Marshal, By T. I. Galbreth, Deputy U. S. Marshal.

[File endorsement omitted.]

UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF
LOUISIANA, NEW ORLEANS DIVISION

[Title omitted]

[fol. 18] PETITION FOR WRIT OF HABEAS CORPUS—Filed April 27,
1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa, and is a citizen of said state and of the United States of America.

2. That petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of Victor Loisel, Esquire, United States Marshal in and for the Eastern District of Louisiana, to wit: at the City of New Orleans in the said District.

3. That the sole claim and the sole authority by virtue of which the said Victor Loisel, Marshal as aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a warrant of removal, made and dated by the Judge of the United States District Court for the Eastern District of Louisiana of April 26, A. D., 1923, [fol. 19] ordering the removal of your petitioner from said Eastern District of Louisiana to the Southern Division of the District of South Dakota, a copy of which is hereto annexed and marked for identification herewith Petitioner's Exhibit "A".

4. That, upon information and belief, the said warrant of removal was made by Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, by virtue of a certain commitment that was issued by Arthur H. Brown, Esquire, United States Commissioner, bottomed on a certain indictment found against petitioner in the proceedings entitled "United States versus B. I. Salinger, Jr., No. 983 W. D., in the District Court of the United States for the District of South Dakota, Western Division," charging petitioner with violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto annexed as part hereof and for identification herewith marked petitioner's Exhibit "B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him, (and as to them he cannot say for he has not been permitted any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa for he was [fol. 20] never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one, nor at the time of nor since the return of said indictment.

6. That said indictment is void and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against

United States of any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to set forth facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

(d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution or furtherance of any scheme to defraud, because the indictment and said letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, the facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Division thereof, and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of his rights under Section 53 of Article three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the Grand Jury, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued or order of removal that is based upon said indictment and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention removal or trial under said indictment, or by virtue of any process thereunder would be a violation of the Fifth and Sixth Amendments to and of Section 53 of Article Three of the Constitution of the United States,

7. That petitioner shows further that no motion has ever been made by him or for him or with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District, and without his motion or consent, the said indictment and all proceedings thereunder, were, upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South Dakota, transferred to that last named Division, and that petitioner's detention for and removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

[fol. 23] 8. Upon information and belief, the said order of removal is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the Statutes of the United States, and will, if the writ herein prayed for be not granted, be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within the said District of South Dakota.

9. That, heretofore your petitioner sued out two writs of habeas corpus in the United States District Court for the Eastern District of Louisiana predicated upon the same grounds as are contained in the foregoing articles of this petition and involving the illegality and nullity of the same indictment; that the writs of habeas corpus issued in said proceedings were made returnable to the United States District Court for the Eastern District of Louisiana on April 20, 1923, and on April 26, 1923, this Honorable Court dismissed said writs and remanded your petitioner; that subsequently petitioner presented petitions for appeal to the Supreme Court of the United States for the decision of this Honorable Court; that said appeals and supersedeas were allowed; that notwithstanding the fact that one of the aforesaid petitions for writ of habeas corpus attacks the commitment of Honorable Arthur H. Brown, United States Commissioner, upon which this Honorable Court predicated its warrant of removal herein yet this Court will not stay the warrant of removal pending the decision of the Supreme Court of the United States on [fol. 24] the aforesaid appeals, and which refusal to stay said order of removal is operating to render nugatory and ineffective said appeals and supersedeas; that the United States District Court for the Eastern District of Louisiana was without power and jurisdiction to make and issue said warrant of removal.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and

em to bring and have your petitioner before this Court at a time
 be by this Court determined, together with the true cause of the de-
 tion of your petitioner, to the end that due inquiry may be had
 the premises, and that this Court may proceed in the summary
 y to determine the facts of this case in that regard, and the le-
 ity of your petitioner's imprisonment, restraint and detention,
 d thereupon to dispose of your petitioner as law and justice may
 quire.

And your petitioner will ever pray.

Dated at the City of New Orleans, the 27 day of April, A. D. 1923.

(Signed) St. Clair Adams, Attorney for Petitioner.

ol. 25] Jurat showing the foregoing was duly sworn to by St.
 air Adams omitted in printing.

UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF
 LOUISIANA

ORDER ISSUING WRIT

Now on this 27th day of April, A. D. 1923, the above matter com-
 on upon the petition for the issuance of a writ of habeas corpus,
 is hereby ordered that said writ issue as in said petition prayed,
 ol. 26] returnable to and before this Court at 11 o'clock A. M. of
 e 28th day of April, A. D. 1923;

By the Court.

Apr. 27, 1923.

(Signed) Rufus E. Foster, Judge.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA,
 NEW ORLEANS DIVISION

[Title omitted]

ANSWER & RETURN TO PETITION FOR WRIT OF HABEAS CORPUS—
 Filed April 28, 1923

o the Honorable the District Court of the United States in and for
 the Eastern District of Louisiana, New Orleans Division:

Now into Court comes Victor Loisel, United States Marshal for
 e Eastern District of Louisiana, the defendant herein, through
 P. Bryant, Jr., Assistant United States Attorney, and for answer
 Plaintiff's petition, says:

I. For lack of sufficient information to justify a belief, respond-
 at accordingly denies the allegations of fact contained in Article I
 Plaintiff's petition.

[fol. 27] II. Respondent admits the allegations of fact contained in Article II of Plaintiff's petition.

III. Respondent admits the allegations of fact contained in Article III of Plaintiff's petition.

IV. For answer to Article IV of Plaintiff's petition respondent shows that the warrant of removal referred to in plaintiff's petition was predicated upon a certain commitment theretofore issued by Arthur H. Brown, Esq., United States Commissioner for the Eastern District of Louisiana, on the 18th day of April, 1923; as also upon consideration upon review thereof of the proceedings had before the said United States Commissioner forming the basis of the commitment by the said United States Commissioner, a transcript of which said proceedings were certified to this Honorable Court through a return made by the said United States Commissioner in the proceedings No. 17238, of the docket of this Honorable Court in response to a writ of certiorari issued by this Honorable Court in said proceedings and directed to the said United States Commissioner.

V. Respondent denies the allegations of fact contained in Article V of Plaintiff's petition, and as to the argumentative allegations and conclusions of law in said article, Respondent sayeth not.

[fol. 28] VI. Answering Article VI of Plaintiff's petition and sub-sections a, b, c, d, e, f, and g thereof, Respondent denies all and singular the allegations of fact therein contained, and as to the argumentative allegations and conclusions of law contained in said Article and subdivisions thereof, Respondent sayeth not.

VII. Respondent admits that the indictment was found by a Grand Jury in the Western Division of the District of South Dakota, and thereafter, by order of the Court the place of trial set for the Southern District of said division of South Dakota, but that said order of Court was made in open Court and in the presence of attorneys representing petitioner herein.

Respondent denies all other allegations contained in article VII of Plaintiff's petition.

VIII. Respondent denies all the allegations of fact and conclusions of law contained in Article VIII of Plaintiff's Petition.

IX. Respondent admits the dismissal of the writ of habeas corpus, as alleged in Article IX of plaintiff's petition. Respondent denies all other allegations of fact and conclusions of law contained in Article IX of plaintiff's petition.

Further answering, respondent shows that he holds petitioner in prison and restrained of his liberty, and detained under authority of the commitment and warrant of removal referred to in Article III of plaintiff's petition.

Wherefore, respondent prays that the writ of habeas corpus herein may be dismissed and that petitioner be dealt with as law and justice may require.

(Signed) L. P. Bryant, Jr., Assistant U. S. Attorney.

Jurat showing the foregoing was duly sworn to by A. A. Schexnaydre omitted in printing.

* * * * *

Exhibit Indictment omitted in printing

[fol. 83] EXHIBIT A TO ANSWER AND RETURN

6. Bench Warrant

To the Marshal of the United States for the District of South Dakota and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid, on the 20th day of May, A. D. 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court, may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid; the bail bond of said defendant having been this day forfeited by the Court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and [fol. 84] seal of said Court, at Sioux Falls, this 18th day of October, A. D. 1922.

Jerry Carleton, Clerk. (Seal of Court.)

DEFENDANT'S EXHIBIT B TO ANSWER AND RETURN

M-356-7

7. Application for Order of Transfer

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF SOUTH
DAKOTA, WESTERN DIVISION

No. 983, W. D.

THE UNITED STATES OF AMERICA, Plaintiff,
againstFRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Motion for Transfer to District of South Dakota—Filed May 2, 1922

Comes now S. W. Clark, the United States Attorney for the District of South Dakota, and respectfully shows unto the Court that the indictment in the above entitled cause was returned by a Grand Jury of the United States drawn from the body of the District at a session of this Court held at the City of Deadwood, Lawrence County, South Dakota, within the Western Division, beginning on the third Tuesday in May, 1922; but that by the recitals in said indictment it appears [fol. 85] that the acts complained of were committed within the Southern Division of the District of South Dakota, and that the trial and all further proceedings herein should be and — within the Southern Division of this District, and by reason thereof application is now made for an order of the Court transferring said cause from the Western Division of the District of South Dakota, to the Southern Division of said District, for all further proceedings herein.

Presented in open Court at Sioux Falls, South Dakota, this 17th day of October, A. D. 1922.

(Signed) S. W. Clark, United States Attorney for the District of South Dakota.

(Indorsed:) No. 983 W. D. In the District Court of the United States, for the District of South Dakota. United States of America, Plaintiff, vs. Fred C. Sawyer, et al., Defendants. Application for Order of Transfer. Filed October 17, 1922. Jerry Carleton, Clerk.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such Clerk, and that such copy is a correct transcript from such original.

[fol. 86] In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of U. S. District Court, Dist. of South Dakota. (Seal.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, James D. Elliott, Judge of the District of the United States, within and for the District aforementioned, the same being a Court of Record, within and for the District aforesaid, do hereby certify, that Jerry Carleton is Clerk of said Court, and was such Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D. 1922.

(Signed) Jas. D. Elliott, Judge of the District Court of the United States for the District of South Dakota. (Seal of District Court of the United States for the District of South Dakota.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States of America, within and for the District aforesaid, do hereby certify, [fol. 87] that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District Court of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

Indorsed: U. S. District Court, S. D. of New York. Filed Dec. 27, 1922.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States, for the Southern District of New York, do hereby certify that the writings annexed to this certificate, namely, Motion for Transfer to District of South Dakota, filed December 27, 1922,

in the case entitled: The United States of America, vs. B. I. Salinger, Jr., et al.; M-7-356, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals. [fol. 88] In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this twenty-eighth day of March, in the year of our Lord One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

Alex. Gilchrist, Jr., Clerk.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA

No. 17,233

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 31, 1923

To the Honorable, the District Court of the United States in and for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The Petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa, and is a citizen of said State and of the United States of America.

2. That petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United [fol. 89] States in the custody of Victor Loisel, Esquire, United States Marshal in and for the Eastern District of Louisiana, to-wit: at the City of New Orleans in the said District.

3. That the sole claim and the sole authority by virtue of which the said Victor Loisel, Marshal aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a commitment, in *writ*-writing, a copy of which is hereunto annexed and marked for identification herewith "petitioner's Exhibit A."

4. That upon information and belief, the said commitment was issued by Arthur H. Brown, Esquire, United States Commissioner, by virtue of a certain indictment found against petitioner in the proceeding entitled "United States versus B. I. Salinger, Jr., No. 983 W. D., in the District Court of the United States, for the District of South Dakota, Western Division," charging petitioner with the violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto

annexed as part hereof and for identification herewith marked "Petitioner's Exhibit B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him (and as to them he cannot say for he has not been permitted [fol. 90] any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa, for he was never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one nor at the time of nor since the return of said indictment.

6. That said indictment is void, and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

[fol. 91] (d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution or furtherance of any scheme to defraud because the indictment and said letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Divi-

sion thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section Two of Article Three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand [fol. 92] Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention removal or trial under said indictment or by virtue of any process thereunder, would be in violation of the Fifth and Sixth Amendments and of Section Two of Article Three of the Constitution of the United States.

7. That petitioner shows further that no motion has ever been made by him or for him or with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District and without his motion or consent, the said indictment and all proceedings thereunder, were upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South Dakota, transferred to that last named Division, and that petitioner's detention for and removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

[fol. 93] 8. Upon information and belief, the said commitment is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the statutes of the United States, and will, if the writ herein prayed for be not granted,

be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within said District of South Dakota.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that this Court may proceed in the summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the thirty-first day of March, A. D. 1923.

(Signed) St. Claire Adams, Attorney for Petitioner, 416 Carondelet Bldg.

[fol. 94] Jurat showing the foregoing was duly sworn to by B. I. Salinger omitted in printing.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF LOUISIANA

ORDER ISSUING WRIT OF HABEAS CORPUS

Now on this thirty-first day of March, A. D. 1923, the above matter coming on from the petition for the issuance of a writ of habeas corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this Court at 11 o'clock A. M. of the sixth day of April, A. D. 1923; and the petitioner is hereby admitted [fol. 95] to bail pending said hearing in the sum of Five Thousand 00/100 Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the Court may from time to time direct.

By the Court.

(Signed) Rufus E. Foster, Judge.

EXHIBIT A TO PETITION

Order of Commitment

Now on this — day of March, A. D. 1923, the surety named in a certain recognizance, dated the 20th day of February, A. D. 1923, for the appearance of B. I. Salinger at a term of the District Court of the United States of the Southern Division of the District of South Dakota, beginning on the third day of April, 1923, to answer an indictment for violation of Section 215 of the Penal Code of the United States, having in my presence at the City of New Orleans, in the Eastern District of Louisiana, delivered to the United States Marshal of said District, the body of B. I. Salinger, named as principal in said bond, the said B. I. Salinger is hereby committed to the custody of said Marshal, pursuant to and by virtue of said indictment, a certified copy of which is on file in my office, to be by him held until discharged in due course of law.

— — —, United States Commissioner for the Eastern District of Louisiana, New Orleans Division.

[fol. 96] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

No. 17238

[Title omitted]

REPORT OF HEARING APRIL 20, 1923—Filed May 2, 1923

Proceedings Had in the Above Entitled and Numbered Matter on Hearing in Open Court Before the Hon. Rufus E. Foster, Judge, on the 20th Day of April, 1923

Appearances: St. Clair Adams, Esq., Attorney for the Petitioner; Louis P. Bryant, Esq., U. S. Asst. District Attorney, and S. W. Clark, Esq., District Attorney for the District of South Dakota, representing the Respondent.

Mr. Bryant: The Government presents a motion praying for order for removal of B. I. Salinger, Jr., and submits herewith motion and order, together with commitment attached.

We file also the return of the Marshal in the proceeding No. 17233, entitled B. I. Salinger vs. Victor Loisel, and also the return of the Marshal in the proceeding No. 17238, entitled B. I. Salinger, Jr., versus Victor Loisel, also in response to writ of Certiorari, directed to United States Commissioner A. H. Browne.

[fol. 97]

Offer, Mr. Adams

Counsel for the relator offers in evidence certified copy of the indictment described in the writ, and secondly, certified copy of an

application for order of transfer to the District Court of the United States for the District of South Dakota, Western Division.

FRED C. SAWYER, sworn and examined as a witness on behalf of the Petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. Fred C. Sawyer.

Q. What is your business?

A. Manufacturer's agent.

Q. What is your address?

A. 1814 Mission Street, South Pasadena, California.

Q. Do you know Mr. C. H. Burlingame?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the Mr. Sawyer who is jointly indicted in the District Court of the United States for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1st, 1919, and May 10, 1920?

A. I was not in Dakota during that period.

Q. You were not in South Dakota during that period of time?

A. No, sir.

No cross examination.

[fol. 98] C. H. BURLINGAME, sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. C. H. Burlingame.

Q. What is your business?

A. I am employed by the California Bank, Los Angeles, in the position of manager.

Q. Do you know Mr. Fred C. Sawyer?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the C. H. Burlingame who is jointly indicted with these gentlemen in the District of South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the state of South Dakota between June 1st, 1919, and May 10, 1920?

A. Not at all.

No cross-examination.

B. I. SALINGER, JR., sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. B. I. Salinger, Jr.

[fol. 99] Q. You are the petitioner in these proceedings for a writ of habeas corpus, are you not?

A. I am.

Q. Where is your home, in what state is it located?

A. My home is in Sioux City, Iowa.

Q. Do you know Mr. C. H. Burlingame and Mr. Fred C. Sawyer who were just on the stand?

A. I do.

Q. Are you the same B. I. Salinger, Jr., who is jointly indicted with those gentlemen in the United States District Court for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1, 1919, and May 10, 1920?

A. None at all.

No cross-examination.

Mr. Adams: I suggest that we make the following agreement:

It is agreed that the testimony already taken on the present petition for writ of habeas corpus shall be used in the other case, No. 17,233, just as if the same were actually taken in that case, it being further understood, however, that this agreement shall not be considered to be a consolidation of the two cases. It is furthermore agreed that the testimony referred to above shall be used and deemed to have been taken in the application of the government for warrant of removal.

Mr. Clark: It being understood, however, that the said removal proceedings are separate and distinct from the habeas corpus proceedings.

[fol. 100] Mr. Adams: I can't make that agreement.

TESTIMONY FOR THE GOVERNMENT

T. I. GALBREATH, sworn and examined as a witness on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Bryant:

Q. What is your name?

A. T. I. Galbreath.

Q. You are United States Deputy Marshal here, are you not?

A. Yes, sir.

Q. Did you have occasion to see the plaintiff, Ben I. Salinger, Jr., on the 31st of March, 1923?

A. I don't remember the date, but it was on the date that Mr. Parsons brought him up to the Commissioner's office, whatever date that was.

Q. State the circumstances in detail of this presentation of Salinger?

A. I answered a phone call this morning——

Objection

Mr. Adams: I object to this testimony. I can't see what probative value it can possibly have.

The Court: Whom did you receive the phone call from?

The Witness: The Clerk's office.

[fol. 101] The Court: Well, omit all that. Just tell what took place when Salinger and Parsons came.

Q. Go ahead.

A. Well, Mr. Parsons came into the office with him, and I turned from my desk just as Mr. Parsons had spoken to some deputy in the office——

Objection

Mr. Adams: I object to anything he said to any deputy in the office.

A. —and I walked out and saluted Mr. Parsons as he was leaving the office. Mr. Salinger was left in the office in charge of—well, I really took Mr. Salinger in charge—he stayed in there a little while and brought him into the private office, into the office where I was working, to keep him from being interviewed or addressed by the newspaper people.

Q. Well now, what, if anything, was said to you by Parsons on that occasion?

Objection

Mr. Adams: I object, if Your Honor please. How can we be bound by anything the counsel for the surety company did?

The Court: Anything Mr. Parsons said in the presence of Mr. Salinger is admissible.

Cross-examination.

By Mr. Adams:

Q. As a matter of fact, you did have Mr. Salinger in custody when he was detained in the private office of the Marshal, did you not?

[fol. 102] A. Oh, yes.

Q. Absolutely, no doubt about that, is there?

A. We had him in there all right.

Q. And, further, there is no doubt about the fact you didn't release him until the habeas corpus was served?

A. No, sir, I didn't.

Q. And until you saw a bond that had been approved by the United States District Judge?

A. Yes, sir.

Q. As a matter of fact, you came down to the Clerk's office, and you examined yourself that bond before you permitted Mr. Salinger to leave your custody, did you not?

A. Not only examined the bond but read the order of the Court and then I went to satisfy myself that that order of Court had been strictly complied with before I let Mr. Salinger go.

Q. Prior to your being satisfied with this bond, you detained him under arrest, did you not and in your custody?

A. Well, from the first time we got sight of Mr. Salinger, why, in view of the fact that the office had been in communication with the United States Marshal and the United States District Attorney from Sioux Falls, why we would have kept Mr. Salinger.

Q. Like any other person?

A. We certainly would.

Q. And you did have him under detention until the writ of habeas corpus was allowed by the Court and bond given, didn't you?

A. Yes, sir.

By Mr. Bryant:

Q. When Salinger walked into the office, had you ever seen him before?

[fol. 103] A. How is that?

Q. When Salinger then walked into the Marshal's office on the first occasion, had you ever seen him before?

A. No, sir.

Q. Had you ever heard of Salinger before that first day that he was in your office, surrendered by Parsons?

Objection

Mr. Adams: I object to that "surrendered by Parsons."

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Objection

Mr. Adams: I object to the whole question on the ground that there is nothing in your return or from what this witness has said to indicate that Salinger was surrendered to the Marshal.

Q. Did you ever see him before?

A. No, sir.

Q. Did you ever hear of him before? I am referring to this occasion that Salinger came into the office.

A. I don't think I ever heard of him before.

Q. When was it you heard from the United States Attorney's office in Sioux City?

A. I would have to see that telegram to answer:

The Court: That has nothing to do with the case.

[fol. 104]

Offer

Mr. Clark: We offer in evidence bond, certified copy of bond given by B. I. Salinger, Jr., to the District Court of the United States for the District of South Dakota, at Des Moines, Iowa, on the 13th day of June, 1922, certified to by the Clerk of the District Court for the District of South Dakota.

Objection

Mr. Adams: Objected to on the ground it is foreign to any issue involved in these proceedings, and irrelevant.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of the record before the Circuit Court of Appeals for the Second Judicial Circuit of the United States, certified to by the Clerk of that Court.

Objection

Mr. Adams: Objected to on the ground it is foreign to the issues of this case, and is irrelevant and res inter alios acta and without probative value here, because there can be no res judicata in matters of habeas corpus, the petitioner having the right to apply to any Judge for such writ, whether he has been denied that right on previous occasions by another Judge or not.

The Court: I overrule the objection.

[fol. 105] Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of an order of the District Court of the United States for the Southern District of New York, in the matter of B. I. Salinger, Jr., petitioner for

habeas corpus, showing proceedings had in that regard on the 16th day of March, 1923.

Objection

Mr. Adams: We make the same objection to that offer that we did to the entire record in the New York case, just as if we restated that objection here.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence a certified copy transcript from the minutes of the District Court of the United States for the Southern District of New York, showing proceedings had in the matter of the removal of B. I. Salinger, Jr., from the Southern District of New York to the District of South Dakota, of date March 20, 1923.

Objection

Mr. Adams: Objected to on the same ground.

The Court: Objection overruled.

[fol. 106] Mr. Adams: I reserve a bill.

Offer

Mr. Clarke: We offer in evidence certified copy of a bond given by B. S. Salinger, Jr., under the order of the District Court of the Southern District of New York, of date March 20, 1923, and conditioned for his appearance before the United States Court for the District of South Dakota for trial at the opening day of April, 1923, term.

Objection

Mr. Adams: Same objection, just as if restated.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the record of the District Court of the United States for the District of South Dakota, in the matter of the United States vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., showing proceedings had in that Court in that cause on the 3rd and 4th days of April, 1923, and consisting of motion for forfeiture of the bond and issuance of bench warrants and the allowance thereof by the Court.

Objection

Mr. Adams: We object on the same ground. It is totally irrelevant to any issues here what transpired in the District of South Dakota when we were down here.

[fol. 107] The Court: Objection overruled.
Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the bench warrant referred to in the minutes of the Court for the District of South Dakota last received in evidence and which is attached to the Commissioner's return.

Objection

Mr. Adams: Same objection.
The Court: Objection overruled.
Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the indictment referred to in the Commissioner's return to this Court under the writ of certiorari and annexed thereto.

Mr. Adams: We have no objection to that, inasmuch as we have offered it ourselves.

Mr. Burns: Evidence closed on both sides.

[fol. 108] Exhibit in Evidence: Transcript of Record, United States Circuit Court, Second Circuit—Filed April 20, 1923.

* * * * *

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the order, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between the United States of America, complainant, and B. I. Salinger, Jr., defendant, a manifest error hath happened to the great damage of the said B. I. Salinger, Jr., as is said and appears by his complaint. We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at the said place, before the Judges

aforesaid, on the 13th day of December, 1922, with the order and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals, for the Second Circuit, may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 11th day of December, in the year of Our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-seventh.

Alex Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

J. W. Mack, U. S. District Judge. (Seal.)

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS
AND TO FILE PRINTED RECORD

[fol. 110] A motion having been made by the petitioner, B. I. Salinger, Jr., on the 11th day of December, 1922, for an order extending the time of the said petitioner to settle and file a bill of exceptions herein to and including the 13th day of January, 1923, and to extend the time of the said petitioner to file his printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, up to and including the said 13th day of January 1923, and the said motion having duly come on before me to be heard on the said 11th day of December, 1922.

Now, after hearing William P. McCool, of counsel for the Petitioner, in support of said motion and Maxwell S. Mattuck, Assistant United States Attorney, in opposition thereto, and due deliberation having been had thereon, it is

Ordered, that the time for the petitioner, B. I. Salinger, Jr., to settle and file the bill of exceptions in the appeal herein be and the same hereby is extended ten days from the 12th day of December 1922, to-wit, up to and including the 22nd day of December, 1922, and it is further

Ordered, that the time of the petitioner, B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeals, for the Second Circuit, be and the same hereby is extended ten days from December 13th, 1922, to-wit, up to and including the 22nd day of December, 1922.

Jno. C. Knox, U. S. D. c.

[fol. 111] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS
AND TO FILE PRINTED RECORD

A motion having been duly made by petitioner, B. I. Salinger, Jr., on the 22nd day of December, 1922, for an order extending the time of the said petitioner to settle and file bill of exceptions herein up to and including the 27th day of December, 1922, and extending the time of said petitioner to file the printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, up to and including the 27th day of December, 1922, and said motion having duly come on before me to be heard on the said 22nd day of December, 1922,

Now therefore, after hearing William P. McCool, of counsel for petitioner, in support of said motion, and Maxwell S. Mattuck, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, it is

Ordered, that the time of petitioner, B. I. Salinger, Jr., to settle [fol. 112] and file the bill of exceptions in the appeal herein be and the same hereby is extended up to and including the 27th day of December, 1922; and it is further

Ordered, that the time of petitioner, B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeal for the Second Circuit be and the same hereby is extended up to and including the 27th day of December, 1922.

Jno. C. Knox, U. S. D. J.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

BILL OF EXCEPTIONS

Writs of Habeas Corpus and Certiorari

Be it remembered, that on the trial of this cause in this Court, at the November, A. D. 1922 term, the Honorable Julian W. Mack, Circuit Judge, presiding, the following proceedings were had and none others, to-wit:

The petitioner, B. I. Salinger, Jr., presented to the Court writs of habeas corpus and certiorari, granted on the 8th day of November, 1922, together with his petition verified on the 8th day of November, 1922, upon which said writs were granted.

Return to the writ of habeas corpus was made by William C. Hecht, United States Marshal.

[fol. 113] Return to the writ of certiorari was made by Hon. Samuel M. Hitchcock, United States Commissioner.

True copies of said writs, petition and returns are annexed hereto and made part of this bill of exceptions.

A hearing was had before the Court thereon, on the 13th day of November, 1922.

No evidence was introduced upon said hearing.

Upon said hearing the Court granted petitioner's motion to amend all papers and proceedings herein so as to correct the spelling of the name of petitioner to "Salinger"; to which the Government took no exception.

The Court also granted petitioner's motion to amend the petition herein so as to allege that the indictment admitted in evidence by the Commissioner was wholly invalid and the Grand Jury had no power to return the same nor the Commissioner power to take any action founded thereon, for the further reason that said indictment was returned by a Grand Jury sitting for the Western Division of the District of South Dakota, whereas certain members of said Grand Jury did not reside within said Western Division but were drawn from other Divisions of said District. The Government thereupon conceded that the said Grand Jury was in fact drawn from the entire District of South Dakota, and not from the Western Division of said District alone, and took no exception to the granting of petitioner's said motion.

At the conclusion of the argument, petitioner requested an opportunity to present a written brief upon the questions raised by him, which application was denied by the Court; to which ruling the petitioner by his counsel, then and there duly excepted.

[fol. 114] At the conclusion of the hearing the Court directed that the said writs of Habeas Corpus and certiorari heretofore granted herein be dismissed and that the petitioner be remanded to the custody of William C. Hecht, United States Marshal for the Southern District of New York, pending his removal to the demanding District; to which ruling of the Court the petitioner by his counsel, then and there duly excepted, and then and there announced in open Court that he would appeal from such ruling and determination to the Circuit Court of Appeals for the Second Circuit, and duly saved his exceptions.

The Court directed that a formal order be prepared and entered upon its decision dismissing said writs over the exception of petitioner, to which ruling, and the entry of which order, the petitioner, by his counsel, then and there duly excepted. Pursuant to said direction of the Court said formal order was entered on the 15th day of November, 1922.

After the conclusion of said hearing and on November 14th, 1922, William C. Hecht, United States Marshal, presented to the Court a further return to the writ of habeas corpus, verified November 14th, 1922.

In furtherance of justice and that right may be done, the said B. I. Salinger, Jr., petitioner, tenders and presents the foregoing (together with the documents and exhibits referred to herein and made

part hereof) as his bill of exceptions to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made part of the record and the same is accordingly done, this 27th day of December, A. D. 1922.

[fol. 115] By the Court:

(Signed) Julian W. Mack, Judge.

IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS

The President of the United States to Honorable William C. Hecht,
United States Marshal, Greeting:

We command you, that you have the body of B. I. Salinger, Jr., by you imprisoned and obtained, as it is said together with the time and cause of such imprisonment and detention by whatsoever name said B. I. Sallinger, Jr., shall be called or charged, before me or the Judge presiding at a Criminal Term of this Court to be held in and for the Southern District of New York at the Court House thereof, Old Post Office Building, Borough of Manhattan, New York City, on the 13th day of November, 1922, at ten-thirty o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning him, and have you then there this writ.

Witness, Honorable Learned Hand, a Judge of the District Court of the United States, the 8th day of November, one thousand nine hundred and twenty-two.

Alex Gilchrist, Clerk. Gilbert, Campbell & Barranco, Attorneys.

Writ allowed, bond in the sum of \$10,000.

J. W. M., C. J. (United States Seal of the Court of the Southern District.)

[fol. 116] IN UNITED STATES DISTRICT COURT

WRIT OF CERTIORARI

The President of the United States, to Hon. Samuel M. Hitchcock,
a Commissioner of the United States, Greeting:

Commands you, that you certify fully and at large to United States District Court, Southern District of New York, Criminal Division, Criminal Term, at the Court House thereof, Old Post Office Building, Manhattan, New York City, on the 13th day of November, 1922, at 10:30 A. M. the day and cause of the imprisonment of B.

I. Salinger, Jr., by you detained; as is said by whatsoever name the said B. I. Salinger, Jr., shall be called or charged; and have you then this writ.

Witness, Hon. Learned Hand, a Judge of the United States District Court, the 8th day of November, 1922.

Alex Gilchrist, Clerk. Gilbert, Campbell & Barranco, Attorneys.

Writ allowed. J. W. M., C. J. (Seal of the United States for Southern District Court.)

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI

The petition of B. I. Salinger, Jr., of Sioux City, State of Iowa, respectfully shows to this Court:

That your petitioner is unjustly and unlawfully detained and restrained of his liberty by, and in the custody of William C. Hecht, the Marshal of the Southern District of New York.

That your petitioner is not detained and restrained by virtue of any final judgment of any Court of competent jurisdiction of any State.

That to the best of the knowledge, information and belief of your petitioner the pretense for his detention is that said Marshal claims the right to hold said petitioner and imprison him by virtue of a certain Warrant of Commitment issued under the circumstances hereinafter related.

That your petitioner is and for many years has been a resident and citizen of the United States and of the State of Iowa.

That on or about May 20, 1922, your petitioner is informed, the Grand Jury of the United States District Court, for the Western Division of the District of South Dakota returned to said Court a certain indictment wherein and whereby, the said Grand Jury charged that your petitioner and certain other parties named in [fol. 118] said indictment were guilty of a violation of Section 215 of the Penal Code of the United States; that as the sole basis for said charge, as your petitioner is informed and believes it was alleged that said defendants had placed in the Post Office of the United States at Sioux City, Iowa, certain letters in consummation of a scheme and artifice to defraud certain persons denominated in said indictment as "the victims."

That on or about the 21st day of October, 1922, your petitioner was arrested by the Marshal of the Southern District of New York. That your deponent is informed and believes that he was arrested

pursuant to a warrant which had theretofore been issued by Hon. Samuel M. Hitchcock, United States Commissioner, upon the affidavit and complaint of Maxwell S. Mattuck, Esq., Assistant United States Attorney for the Southern District of New York, said complaint charging in effect that your petitioner was under the indictment heretofore mentioned and was fugitive from justice.

That thereupon and on the same day, your petitioner was taken before the said United States Commissioner by said Marshal pursuant to said warrant, and then and there was admitted to bail in the sum of One Thousand (\$1,000) Dollars, and the matter set down for a hearing for the 8th day of November, 1922.

That on said 8th day of November, 1922, a hearing was had before the said United States Commissioner, and the said Commissioner thereupon summarily found that there existed probable cause to believe that this petitioner was guilty of the charge against him, and thereupon the said Commissioner cancelled the bail of said petitioner and committed the said petitioner to the custody of the said Marshal with directions that said petitioner be imprisoned and detained by the said Marshal until a warrant should issue by a Judge of the Southern District of New York, directing the removal of your petitioner from said Southern District of New York to the District of South Dakota, and thereupon a Warrant of Commitment for said custody was issued by said United States Commissioner and placed in the hands of the said Marshal; that thereupon the said Marshal arrested your petitioner and placed him in custody and restrained him of his liberty and detained him, and does still so imprison and detain your petitioner.

That upon the said hearing had before the said Commissioner, the only evidence introduced against the said petitioner was the complaint of said Assistant United States Attorney Mattuck, hereinbefore referred to, together with a certified copy of the indictment returned in the United States District Court for the Western Division of the District of South Dakota. The identity of the person charged in the complaint and indictment with your petitioner was admitted.

That your petitioner duly objected to the admissibility of said complaint and indictment as evidence to show probable cause for believing the defendant guilty of any offense against the United States, and particularly of having committed any offense, and especially the offense charged, within the territorial limits of the Western Division of the District of South Dakota, or within any Division of the District of South Dakota, and your petitioner urged that said indictment and complaint upon its face failed to show or allege that any crime or offense had been committed by your petitioner and especially that any crime or offense had been committed within the [fol. 120] territorial limits and jurisdiction of the District of South Dakota, or in any Division thereof, and particularly in the Western Division thereof, and particularly for the following reasons:

I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United

States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefor said indictment and any proceedings thereunder, and especially any trial, are and would be in violation [fol. 121] of the rights of petitioner under the Fifth and Sixth Amendment of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offense as may be found to be charged in the indictment is charged to have been committed at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now, for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly, to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

VII. Subject to grounds "I, II, III, IV, V and VI" hereof petitioner further states that evidence presented before the said Grand [fol. 122] Jury as to all the counts contained in said indictment except Counts 1, 4 and 6 thereof, was insufficient to sustain the indict-

ment for the reasons among others that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are indorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury, there was introduced and used certain books, and the legal custodian of said books although subpoenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII and VIII" hereof presents the affidavits of Charles H. Rathburn and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IX. That subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, [fol. 123] indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding.

X. Subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together, render it difficult to construe and almost unintelligible; and it so lacks certainty of averment that petitioner ought not to be compelled to respond thereto.

XI. Subject to all of the foregoing grounds, the petitioner says that the indictment attempts to charge a scheme by means of fraudulent pretenses, representations and promises, and with the intent to defraud, to obtain from the persons styled in the indictment as victims certain of their moneys and property by means of inducing them to part with their said property in exchange for shares of stock of the Midland Corporation; said indictment further attempts to charge that the defendants, each and all, including your petitioner, used the Post Office establishment in the United States to transmit to said victims, in alleged execution of said scheme, the letters set out in the indictment and petitioner avers that it appears on the fact of said indictment that none of said letters was in execution of said alleged scheme, but that said letters showed on their face that when they were written they and each of them referred to acts or things then completed and finished and executed, and therefore incapable of being

[fol. 124] further executed; and it appears on the face of the indictment that none of said letters made any effort to obtain anything from any one, nor is it charged that anything was obtained from anyone.

XII. Subject to all of the foregoing grounds, petitioner further says that although the indictment charges nothing but a scheme by such fraudulent means and devices to obtain money and property, and that this was done with intent to defraud, still the indictment nowhere charges that if any thing was obtained from said victims, nor does it contain anything to show that the shares of stock of the said Midland Corporation therein referred to were not of the fair and reasonable value of the consideration paid therefor, and particularly fails to that anyone whosoever was in fact defrauded by your petitioner or by any of the defendants, whether by means of the said letters or otherwise.

Your petitioner further says that the said Commissioner overruled his objections, to which petitioner saved his exceptions, and your petitioner now urges the said objections to this Court in support of this petition for writs of habeas corpus and certiorari with the same force and effect as if hereinagain set forth at length, and urges that the ruling of said Commissioner was erroneous.

Your petitioner further says that he offered evidence before said Commissioner to prove that he was not guilty in fact of the matters and things charged in said complaint and indictment against him, and that there was no probable cause for believing him guilty of the charge, and also offered evidence to prove that the matters and things alleged in said complaint and indictment did not happen or occur [fol. 125] or arise within the District of South Dakota, and particularly within the Western Division thereof, and that the said United States Court within said district had no jurisdiction of the offense; that said Commissioner ruled that he could not receive such evidence and refused to hear or consider the same.

Your petitioner further says that the letters complained of concern the affairs of the Midland Packing Company, a corporation organized under the laws of Iowa, and having its plant, offices and records at Sioux City, Iowa, where the said letters are alleged to have been mailed; that a great majority of the stock was sold in Iowa; it is well known in said State that the money derived from the sale of the stock was honestly administered. That is, your petitioner is informed and believes, prior to the time of the proceedings in South Dakota which culminated in the indictment now under review, the following matters set forth in said indictment were fully investigated first by the Post Office authorities and later by the United States Attorney for the District of Iowa, for the purpose of ascertaining if there existed probable cause to believe that a crime had been committed; that after such investigation had as aforesaid in Iowa the United States Attorney refused to present the matter to the Grand Jury for the District of Iowa. That at the same time that the indictment was found in South Dakota, as your petitioner is informed and believes, the Grand Jury for the District of Iowa was in session

at Sioux City, Iowa, for the hearing of presentment, and no presentment was made to said Grand Jury against your petitioner.

All of the witnesses who appeared before the Grand Jury in South [fol. 126] Dakota, as your petitioner is informed and believes, were brought into the said jurisdiction from Sioux City, Iowa, for the express purpose of testifying. The alleged indictment therefore was found in a wholly foreign jurisdiction far distant from the home city of your petitioner. That your petitioner was never in the State of South Dakota at the time that the acts complained of in the indictment are alleged to have been committed.

By reason of the foregoing your petitioner respectfully urges that he is unlawfully detained and restrained of his liberty, and he prays that writs of habeas corpus and certiorari may issue in his behalf, directed to the Marshal of the Southern District of New York, requiring said Marshal to bring your petitioner before this Court forthwith and to discharge your petitioner from custody.

That no previous application for such writs has been made.

B. I. Salinger, Jr.

Jurat showing the foregoing was duly sworn to by B. I. Salinger, Jr. omitted in printing.

[fol. 127]

EXHIBIT "A" TO PETITION

DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION, DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR., Defendants

Affidavit of Charles L. Rathbun, Annexed to Petition

DISTRICT OF SOUTH DAKOTA,

County of Brown,

State of South Dakota, ss:

Charles L. Rathbun, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court and appeared and served thereon at said term of Court during which term the above entitled case was presented to said grand jury. That he remembers that three young ladies whose names he does not now recollect, appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out

through the United States mail; that W. J. Shanard of Bridgewater, South Dakota, appeared and testified in regard to a letter that he claimed to have received from defendants through the United States Mail; that Martin Christianson of Viborg, South Dakota, appeared [fol. 128] and testified that he had received certain letters from the defendants through the United States mail at Viborg, South Dakota; that a post office inspector, I think by the name of Hughes, appeared and testified in regard to the letters which he produced and as I believe described in the indictment, that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and as I believe documents from South Dakota, State Securities Commission, that said papers were not identified by any witness except said Hughes; that no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of my recollection now, no other recipients of letters described in the indictment testified before the grand jury except the two persons that I have mentioned, Mr. Christianson and Mr. Shanard; the post office inspector might have testified about the other letters described in the indictment but I am not positive as to each letter.

C. L. Rathbun.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public. (Notarial Seal.)

[fol. 129]

EXHIBIT "B" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION,
DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,
against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR., De-
fendants

Affidavit of Samuel W. Huntington, Annexed to Petition—Filed
Nov. 8, 1922

DISTRICT OF SOUTH DAKOTA,
State of South Dakota,
County of Brown, ss:

Samuel W. Huntington, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court, and appeared and served

hereon at said term of Court, during which term the above entitled case was presented to the grand jury. That he remembers that three young ladies whose names he does not now recollect appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out through the United States mail; that a party whose name is W. J. Shanard of Bridgewater, South Dakota, to the best recollection of affiant, appeared and testified in regard to a letter which he claimed to have received from defendants through United States mail, that a party whose name is Martin Christianson of Viborg, South Dakota, appeared and testified that he had received certain letters from defendants through United States mail at Viborg, South Dakota; that a post office inspector, affiant thinks by the name of Hughes, appeared and testified in regard to letters which he produced and affiant believes were described in the indictment that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and affiant believes that documents from the South Dakota States Securities Commission; that said papers were not identified by any witness except the aforementioned inspector whose name affiant recalls as Hughes; that to the best of affiant's knowledge and belief, no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of affiant's recollection now no other recipients of letters described in the indictment testified before the grand jury save the two persons mentioned Christianson and Shanard; that the post office inspector may have testified about the letters other than the two Christianson and Shanard described in the indictment, but as to that affiant is unable to state positively.

S. W. Huntington.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public, State of South Dakota. (Notarial Seal.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States of America in and for the District of South Dakota, do hereby certify that on the 17th day of October, A. D. 1922, there was filed in the [fol. 131] above entitled Court, on behalf of the defendant, Fred C. Sawyer, in the case of the United States, Plaintiff, vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., Defendants, Motion to Quash Indictment, that attached to and made a part of said Motion to Quash Indictment is the affidavit of Charles L. Rathbun marked Exhibit "A," and also the affidavit of S. W. Huntington, marked Exhibit "B"; that I have compared the foregoing copy of said affidavits with the originals thereof, which are in my custody as such Clerk, and that such copy is a correct transcript from such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District, this 4th day of November, A. D. 1922.

Jerry Carleton, Clerk. By C. C. Schwarz, Deputy. (Seal.)

[File endorsement omitted.]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New [fol. 132] York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to said writ alleges as follows:

1. Upon information and belief that May 20, 1922, the grand jurors of the United States of America for the District of South Dakota, did present to the United States District Court for the said district an indictment against the said B. I. Salinger, a copy whereof is hereto annexed marked "Exhibit A," and which said indictment is hereby made part hereof with the same force and effect as if the said indictment were here set forth in full.

2. That thereafter, upon information and belief, on October 21, 1922, the United States Commissioner sitting in and for the Southern District of New York, did issue his warrant directed to your respondent, commanding him in the name of the President of the United States of America to apprehend the said B. I. Salinger, who was then and there in the Southern District of New York, and to bring the said Salinger before him, the said Commissioner, at the Post Office Building in the City of New York, to answer to a complaint praying for the removal of the said Salinger to the said District of South Dakota to answer to the indictment aforesaid.

3. That thereafter the respondent duly apprehended the said Salinger within the Southern District of New York.

4. That thereafter, on the 15th day of November, 1922, the relator having been arraigned before the said United States Commissioner. [fol. 133] was heard in opposition to the said prayer for removal, and at the conclusion of the said hearing the said Commissioner committed the said relator to the custody of your respondent to await an order for the removal of the said Salinger to the said District of South

Dakota, there to await trial, and the relator was taken into custody by your respondent.

The sources of your deponent's information and the grounds of his belief as to the facts hereinbefore alleged are the records of the United States Commissioner for the Southern District of New York.

Wherefore, deponent prays that the writ of habeas corpus herein may be dismissed and that the said B. I. Salinger be remanded to the custody of the respondent to be dealt with according to law.

William C. Hecht.

Sworn to before me this 11th day of November, 1922. Henry
Straus, Notary Public, N. Y. County Clerk's No. 854.
(Seal.)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FURTHER RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New [fol. 134] York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to the said writ

1. Denies on information and belief the allegations contained in folio 23 of Paragraph XII of the petition herein and more particularly that allegation in the said petition, that the said Commissioner ruled that he could not receive the evidence offered by the said relator and that the Commissioner refused to hear and consider the same.

William C. Hecht.

Sworn to before me this 14th day of November, 1922. Henry
Straus, Notary Public, N. Y. Co. Clerk's No. 854. (Seal.)

IN UNITED STATES DISTRICT COURT

Before Hon. Samuel M. Hitchcock, United States Commissioner for
the Southern District of New York

UNITED STATES

against

B. I. SALINGER, JR.

RETURN TO WRIT OF CERTIORARI

I. Complaint

SOUTHERN DISTRICT OF NEW YORK, ss:

Maxwell S. Mattuck, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and on information and belief alleges and charges:

[fol. 135] That within the period of three years last past, B. I. Salinger, the defendant above named, was indicted at Sioux Falls, South Dakota, for violating certain statutes of the United States to-wit 215 U. S. C. C. using U. S. mails to defraud.

That an indictment was filed against the said B. I. Salinger in the aforesaid District of South Dakota.

That since the date of the said indictment the said defendant Salinger has been a fugitive from the said District of South Dakota.

That the said defendant Salinger is now within the Southern District of New York, a fugitive from justice as aforesaid; against the peace of the United States and their dignity and contrary to the form of the statutes of the United States in such case made and provided.

The sources of deponent's information and the grounds of his belief are a telegram to the United States Marshal for the Southern District of New York from the United States Marshal for the District of South Dakota.

Wherefore, deponent prays that a warrant may issue for the above named defendant and that he may be apprehended, bailed or removed to the said District of South Dakota as the case may be.

Maxwell S. Mattuck.

Sworn to before me this 21st day of October, 1922. Samuel
M. Hitchcock, U. S. Commissioner, Southern District of
New York.

Approved: M. S. Mattuck, Assistant United States Attorney.

fol. 136]

IN UNITED STATES DISTRICT COURT

WARRANT

the President of the United States of America to the Marshal of the United States for the Southern District of New York and to their Deputies, or any or either of them:

Whereas, complaint on oath hath been made to me, charging that B. I. Salinger, Jr., did, within the period of three years prior to the 1st day of October, in the year one thousand nine hundred and twenty-two, at the Southern District of South Dakota, use the mails of the United States to defraud; against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said B. I. Salinger, Jr., and bring his body forthwith before me, or some Judge or Justice of the United States, wherever in the Southern District of New York he may be found, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 21st day of October, in the year of our Lord one thousand nine hundred and twenty-two.

Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. William Hayward, United States Attorney.

fol. 137] Indorsed: Warrant to Apprehend. Received this warrant on the 21st day of October, 1922, at New York City, and executed the same by arresting the within named B. I. Salinger, Jr., New York City, on the 21st day of October, 1922, and have his body now in Court, as within I am commanded.

William C. Hecht, U. S. Marshal, S. D. of N. Y.

Defendant arraigned, bail \$10,000. Hearing adjourned to the 11th day of November, 1922, at ten o'clock, A. M. Paroled for bail.

Dated, New York, October 21, 1922.

Samuel M. Hitchcock, U. S. Commissioner, Southern District of New York.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Before Samuel M. Hitchcock, United States Commissioner.

[Title omitted]

COMMITMENT

Defendant, 11, 8, 1922, after having been heard upon the charge fol. 138] against him, ordered, that he be held to answer to the

charge and any order of the Court that he be admitted to bail in the sum of \$5,000 and that he be committed to the custody — United States Marshal for the Southern District of New York until such bail is given.

Dated, New York, November 8, 1922.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Defendant having given bail, it is ordered that he be released from custody.

Dated, New York.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Bail fixed in the sum of \$10,000. Defendant paroled in custody of counsel until November 9, 1922, 10:30 A. M.

Bail of Commissioner Hitchcock ordered continued until November 9, 1922.

November 6, 1922.

J. M. M., U. S. C. J.

Final Commitment.

[fol. 139] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MINUTES OF HEARING BEFORE COMMISSIONER

Hearing before Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, at New York, at his office, Room No. 314, in the United States Court, Post Office Building, City of New York, on November 8th, 1922, at two-thirty p. m.

Appearances: William Hayward, United States Attorney; by M. S. Mattuck, Assistant United States Attorney, Counsel; Gilbert, Campbell & Barranco, 14 Wall Street, New York City; by Richard Campbell and William McCool, Counsel; Wade H. Ellis, Washington, D. C.

Mr. Mattuck: The Government offers in evidence a certified copy of the indictment found in the Western Division for the District of South Dakota on the 20th day of May, 1922, and bench warrant on that indictment issued in the aforesaid district on the 18th day of October, 1922.

Mr. McCool: The defendant objects to the reception of this indictment in evidence upon the following grounds:

[fol. 140] I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or

any of the defendants therein named with any crime or offense against the United States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

[fol. 141] V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offense as may be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petition further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly, to arrest, or detain or imprison, your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

VII. Subject to grounds, "I, II, III, IV, V, and VI" hereof, petitioner further states that evidence presented before the Grand Jury as to all the counts contained in said indictment except Counts

1, 4 and 6, thereof, was insufficient to sustain the indictment for the reasons, among others, that no person called as a witness before [fol. 142] said Grand Jury had any personal knowl or whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail, or whether they had been delivered to the addresses thereof by mail, and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are indorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury there was introduced and used certain books, and the legal custodian of said books although subpoenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII" and "VIII" hereof presents the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IX. That subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner, or the other defendants of the charge against him or them or make the same clear to the common understanding.

[fol. 143] X. Subject to grounds "I, II, III, IV, V and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together render it difficult to construe and almost unintelligible.

Furthermore, the indictment charges a scheme by means of fraudulent pretenses with intent to defraud and in connection with said scheme the use of the Post Office establishment. It appears on the face of the indictment that when the letters were written, the acts had then been completed and executed and were incapable of being furthered by the use of the mails.

And finally that the indictment does not charge what, if anything, was obtained from the victims named in the indictment and does not show any fraud exercised. The only fraud alleged, referring to the sale of shares of stock of the Midland Corporation, and nothing in the indictment to show that they were not worth the consideration that was paid therefor.

Upon all these grounds, Mr. Salinger claims that the indictment should not be received in evidence it being wholly void on the face thereof.

The Commissioner: I cannot pass upon any such question as that until the indictment is in evidence.

Mr. McCool: Do you overrule my objection, Mr. Commissioner?

The Commissioner: Yes.

[fol. 144] Mr. McCool: I save my exception to that.

The Commissioner: Have you a similar objection to the warrant that has been issued pursuant to the indictment?

Mr. McCool: Precisely. That has not been offered yet.

The Commissioner: Yes, it has been offered.

Mr. McCool: I make the same exception to the warrant, on the ground that it is wholly immaterial and not founded on a valid indictment.

The Commissioner: Your objections are overruled at the present time.

Mr. McCool: I respectfully except. It is now in evidence, and I move to strike it out on like grounds, both the indictment and the warrant.

The Commissioner: Motion denied.

Mr. McCool: I respectfully except.

Mr. Mattuck: The defendant concedes the identity of the witness.

The Government rests.

[fol. 145] Mr. McCool: I move to dismiss the proceedings upon the same grounds which I stated in my objection to the reception of the indictment: No evidence to show that there is any valid indictment and no evidence to show that there is any reasonable cause to show the man is guilty.

The Commissioner: Unless an indictment is so absolutely bad upon its face that there can be nothing said in its favor, it is held practically in every district, and it has been held in the Supreme Court of the United States, that the proper place to raise *each* objection is in the forum in which the indictment was found.

I have not had an opportunity to examine this indictment at length. It has only been offered to-day and since it has been offered this morning it has been in the custody of counsel for the defendant and the Commissioner has not even read it.

I understand that this matter is one which is to be expedited and that an application is going to be made to the Court in regard to this indictment and that the ends of the defendant will best be satisfied if he rests now on this motion and my ruling; by having me commit the defendant to the custody of the marshal and then you will make such application in the Courts as you may desire.

Mr. McCool: You rule, then, that your Honor will not receive any evidence that this man is not guilty in fact? Does your Honor want to go into that?

Mr. Mattuck: Yes, we will receive any evidence you want to offer.

[fol. 146] Mr. McCool: We cannot offer any to-day. We want reasonable opportunity to present evidence that the man is not guilty in fact.

The Commissioner: One moment. I do not see a great deal that you can do. It is incurring a large expense. If your objections to the indictment are good and valid, they will be up-held by the Court, and if they are not, the Court will send this matter back to me for further hearing upon your suggestion. Your rights may be saved in that way, whatever rights you may have, but for the purpose of expedition, and you, having been informed that the District Attorney for the demanding district would be here at this time, I think it is only proper that this proceeding should take this course.

Mr. McCool: In other words, the evidence will not be received?

Mr. Mattuck: Just one moment. I will ask the Commissioner not to rule until I have made my statement about the reception of evidence at this time. I would like to make a statement on the record.

The Commissioner: Go ahead.

Mr. Mattuck: When was it you were here with me, Mr. McCool?

Mr. McCool: The 21st of October was the first time.

[fol. 147] Mr. Mattuck: No, that you actually came with me to the Commissioner's office?

The Commissioner: That was the 21st of October.

Mr. Mattuck: On the 21st of October, 1922, Mr. McCool came with Government counsel to the office of the United States Commissioner for the purpose of arranging a date mutually convenient to himself and to the Government's counsel for the proceeding with the hearing of this case. At that time and in the presence of the Court, Government's counsel stated to Mr. McCool that the Government would be ready to proceed on Monday, November 6th, with the hearing, at which time the course that the Government would follow would be this: That the indictment would be offered in evidence and that identity of the defendant would be proved, whereupon the Government would rest.

It was also stated at that time by counsel for the Government that Mr. Clark, the District Attorney of the District in which the indictment was found, was coming here and that in order that he may not be put to the inconvenience and expense of remaining in this district over an extended period of time, it was suggested at that time to Mr. McCool that he be prepared on November 6th to go on with the hearing in order that the hearing may be completed within as short a space of time as possible, and that in the event of a commitment by the Commissioner, he would be enabled to procure his writ and have the matter cleaned up within three days.

Mr. McCool at that time stated that November 6th, would be inconvenient for him but that if I would agree to November 8th, the [fol. 148] day following Election Day, it would be absolutely agreeable to him to proceed with the hearing at that time, and in the event of a commitment, to have his papers prepared and to go before the Court on a petition for a writ.

Mr. Mattuck Government's Counsel, at that time stipulated that that was perfectly agreeable; that on November 8th Mr. Clark would be notified to be here, at which time he would be prepared to go on with and complete the hearing, Mr. Clark coming all the way from South Dakota. Mr. McCool agreed.

Government's counsel now objected to any further delay in the going on with this hearing, but does not oppose the admission of any evidence which the defense wished to offer now in rebuttal of the resumption of probable cause created by the indictment. The objection of Government's counsel is entirely to delay, a delay which every effort was made by Government's counsel to forestall ten days ago. Within that period of ten days, it is urged that every effort could have been made by the defense to have procured any witnesses which they desired to rebut probable cause. The objection of Government's counsel, therefore, is not to the admission of evidence, but to a delay and a postponement of this hearing on the grounds stated. Mr. McCool: Before this morning it was impossible for the defendant to know what indictment he was called to answer in this district. The indictment was inspected this morning. It now shows an indictment found in the Western Division of the District of South Dakota. I want an opportunity to meet that particular indictment, as we understand another indictment has been found [vol. 149] in another Division. There is no desire on the part of the defendant to delay this hearing if the Government is not willing to give us reasonable opportunity to present our witnesses and bring them on and answer this indictment, of course it is impossible to do today.

I understand that the Commissioner has ruled that that evidence will not be received, to which I save my exception.

The Commissioner: I have not ruled any such way at all and the record will not show it. On the other hand I appreciate that this hearing before me is for the purpose of taking testimony.

I am perfectly familiar with the case of the United States vs. Green, where the action was decided by Judge Brown in the first instance twenty-five years ago, and I certainly never said that I would not receive evidence. But it is a question of when that evidence could be presented.

It is perfectly clear to my mind what happened before me on the last day of last month. Then the matter was set over until the 4th of November for the reasons stated, that the District Attorney for the demanding district would be here at that time, and it was suggested that you be prepared at the time to go on with the hearing. If you are not prepared and the government has made its prima facie case by representing this indictment, I have overruled your objection to its receipt in evidence, then of course, I have nothing else to do. The Government demands it and having in mind what the arrangements were and also having in mind that you might have obtained a copy of the indictment by application to the Court in which it was found.

[vol. 150] Mr. Mattuck: Not only that. May I state on the record that there was handed to me, Government's Counsel, the date of the original arrest of Mr. Salinger (that was on October 21st or 22nd), a copy of the indictment itself by counsel for the defense. I think that is a clear rebuttal of the argument that they did not know what they were indicted for.

Mr. McCool: We did not know which indictment we were to answer because there was another indictment.

Mr. Mattuck: We are only calling upon counsel to answer the indictment that he would know about.

Mr. McCool: We were told here that another indictment had been found in another division.

Minutes of Hearing Before Commissioner

Mr. Mattuck: If your Honor pleases, the Government's Counsel cannot be responsible for everything the defendants have been told. The defendants are being called upon here to answer an indictment, a copy of which they themselves gave me some fifteen days ago.

Mr. McCool: There is not any use of our going ahead with our proofs or just one section of it. It is not going to do the defendant [fol. 151] any good until he can bring all his witnesses here.

Mr. Mattuck: You are just attacking the matter here and I do not see any useful purpose in it.

Mr. McCool: We make our offer, if reasonable opportunity is given to us, to prove that we are not guilty of fact. I understand that the Government objects to reasonable opportunity being given.

Mr. Mattuck: The Government objects to an adjournment.

Mr. Campbell: Which is the same thing.

The Commissioner: I do not understand that it is the same thing. You had this indictment before you at the time that this defendant was here and then you were given from the 21st of October until the 4th of November to prepare for this hearing.

Mr. Campbell: Up to this morning, we did not know to which of these Indictments we were going to answer. I understand that there is another indictment.

Mr. Mattuck: I do not understand anything about it. We are not responsible for the understanding of counsel.

The Commissioner: I have passed upon this matter.

[fol. 152] Mr. Mattuck: The Indictment which you are called upon to answer is the indictment which you have had in your possession for a long time; just how long, I do not know, but certainly from the date of the inception of this hearing.

Mr. McCool: Another thing that I would like to call your Honor's attention to in support of the reasonableness of my request is this: Part of our proof consists of the books of the company. We are enjoined at this time by the order of the Court, as I understand it, from even looking at those books, much less producing them. We would have to leave opportunity to have that order vacated and bring those books on, so that we could prove our case. It would take at least fifteen days to try this case on its merits.

Mr. Mattuck: In answer thereto, Government's counsel will offer a certified copy of the proceedings that have heretofore taken place in the District of South Dakota, wherever it is. I would like to state on the record, if your Honor please, just what has taken place in this case. Then I will offer the paper itself in evidence, if necessary.

The indictment, as already stated, was found on the 20th day of May, 1922. Two of the defendants, not the defendant Salinger,

were arraigned and pleaded to the Indictment on the 17th day of October, 1922. The defendant Salinger was arrested.

Mr. McCool: How is all this relevant on the question of probable cause?

[fol. 153] Mr. Mattuck: Not competent at all on the question of probable cause. The question that you have just raised is the question of whether or not the defendant is to be given reasonable opportunity to produce the books. I am going to show that he has had reasonable opportunity to get books, make motions and everything else.

Mr. McCool: That is not the question here before the Commissioner.

Mr. Mattuck: You just raised the question.

Mr. McCool: The question is whether we shall have reasonable opportunity now.

Mr. Mattuck: The counsel can very well come in three weeks from now and ask for further reasonable opportunity. I am trying to show that reasonable opportunity has been had by counsel for a long time.

Mr. McCool: I cannot see that that is relevant. We have not had reasonable opportunity to produce the evidence on this hearing.

Mr. Mattuck: I have answered that again by stating that ten days—

Mr. McCool: I say that ten days is not enough.

[fol. 154] Mr. Mattuck: May I be permitted to finish my argument in answer to his for the purpose of the record?

The Commissioner: Yes, I will not stop you.

Mr. Mattuck: The defendant Salinger gave bail in the District of Iowa, Northern District, on the 13th day of June, 1922. Bond in the sum of \$10,000 was given by the defendant Salinger for appearance in South Dakota. Thereafter the trial date was set for the 17th day of October, 1922, at which time the defendant Salinger did not conform to the condition of his bond, did not appear in the District of South Dakota, for trial, and the bond in that District was thereupon ordered forfeited.

It is therefore, submitted with regard to the question of a motion for the return of books or whatever argument it was that Mr. McCool made with regard to further time, that such a motion is being interposed here merely for purposes of delay, because reasonable opportunity for the defendant Salinger was given to him between the dates of the filing of the indictment and certainly between the dates of his furnishing bond for his appearance in South Dakota, and the date of trial, to take such steps as he deemed necessary for the purpose of procuring books and other evidence which he deemed necessary. For the purpose of this hearing, it is again submitted that in view of the stipulation entered into between counsel to proceed on this day that no adjournment should be granted at this time.

Mr. McCool: In answer to that, counsel for the defendant very respectfully but very earnestly objects to any statement that he is [fol. 155] attempting to delay this proceeding. He states his pur-

poses here are to attempt to aid his client, not to impede the progress of the government.

The Commissioner: Is there any motion before me now?

Mr. McCool: Yes, sir, the motion is for reasonable opportunity to get these books which have been enjoined.

The Commissioner: I take it that that is a motion for an adjournment.

Mr. McCool: Yes, sir.

The Commissioner: I shall deny that motion.

Mr. McCool: I respectfully except.

The defendant offers in evidence what purports to be an affidavit of Mr. S. W. Clark, United States Attorney for the District of South Dakota, verified October 17th, 1922, and a copy of an order of transfer granted by the Honorable James D. Elliott, District Judge of the District Court of the United States for the District of South Dakota, Western Division.

You concede, Mr. Mattuck, that those are true copies?

Mr. Mattuck: Yes. That concession should not be taken to mean that there is no objection to their admission in evidence. Yes, I will concede that they are the affidavits. They bear the original signature of Mr. Clark. They are copies.

Mr. McCool: And that the contents thereof are true?

Mr. Mattuck: And that the contents are true.

Mr. McCool: The defendant offers in evidence a certified copy of an affidavit of S. W. Clark, verified October 17, 1922.

Mr. Mattuck: No objection to those things going in.

Mr. McCool: An order of the Honorable James D. Elliott, Judge of the United States District Court, District of South Dakota, Western Division, dated October 17th, 1922, transferring the above entitled cause from the Western Division of South Dakota to the Southern Division thereof. I ask that they be marked Defendant's Exhibits A and B.

(Marked Defendant's Exhibits A and B respectively.)

Mr. McCool: The defendant rests and now renews his motion to dismiss.

The Commissioner: Motion is denied.

Mr. McCool: To which the defendant respectfully excepts.

[fol. 157] The Commissioner: Of course, this brings this matter to a conclusion.

NOTE.—The indictment herein, same as Indictment copied at page — of this Transcript.

BENCH WARRANT

To the Marshal of the United States for the District of South Dakota and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid, on the 20th day of May, A. D. 1922, the

Grand Jurors in and for the said District of South Dakota brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court, may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota to answer the indictment aforesaid; the bail bond of said defendant having been this day forfeited by the Court.

[fol. 158] Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 18th day of October, A. D. 1922.

Jerry Carleton, Clerk. (Seal of Court.)

Indorsement of warrant: United States District Court, District of South Dakota—Southern Division. Crim. No. 1978, So. Div. The United States of America, Plaintiff, against B. I. Salinger, Jr., Defendant. Warrant. Returned and filed this 20th day of October, A. D. 1922. Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received this warrant on the 18th day of October, 1922, and after a due and diligent search I am unable to find the within-named defendant, B. I. Salinger, Jr., within this District.

W. H. King, U. S. Marshal, By N. H. Jensen, Deputy. (Seal of Court.)

[fol. 159] UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls in said District this 20th day of October, A. D. 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy. (Seal.)

Exhibit B, motion for transfer from Western Division to Southern Division of District of South Dakota, omitted from the printed record having been heretofore copied at page 84.

* * * * *

DEFENDANT'S EXHIBIT A

In the District Court of the United States, District of South Dakota—
Western Division

[Title omitted]

Order of Transfer—Filed Oct. 17, 1922

Application having been made by the United States Attorney for the District of South Dakota, for a transfer of the above entitled [fol. 160] cause from the Western Division of the District of South Dakota to the Southern Division thereof, said application being presented in open Court and in the presence of the defendant Fred C. Sawyer and of their attorneys, and good cause being shown;

It is now ordered that the above entitled cause be and the same is hereby transferred from the Western Division of the District of South Dakota to the Southern Division of the District of South Dakota, and that all further proceedings herein be had in said Southern Division.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 17th day of October, A. D. 1922.

By the Court.

Attest:

Jerry Carleton, Clerk. (Seal of Court.)

[File endorsement omitted.]

UNITED STATES OF AMERICA,

District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

[fol. 161] In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk. (Seal of U. S. District Court, Dist. of So. Dakota).

UNITED STATES OF AMERICA,

District of South Dakota, ss:

I, James D. Elliott, Judge of the District of the United States, within and for the District aforementioned, the same being a Court of Record, within and for the District aforesaid, do hereby certify that Jerry Carleton is clerk of said Court, and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D. 1922.

Jas. D. Elliott, Judge of the District Court of the United States for the District of South Dakota. (Seal of the District Court of the United States for the District of South Dakota).

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States of America within and for the District aforesaid, do hereby certify that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid. [fol. 162] duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

AT A TERM OF THE UNITED STATES DISTRICT COURT HELD IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AT THE COURT HOUSE THEREOF, IN THE BOROUGH OF MANHATTAN, NEW YORK CITY, ON THE 15TH DAY OF NOVEMBER, 1922

[Title omitted]

ORDER DISMISSING WRITS

The writs of habeas corpus and certiorari heretofore allowed to the above named B. I. Salinger, Jr., having duly come on to be heard before the Honorable Julian W. Mack, Circuit Judge, at a term of his Court, held on the 13th day of November, 1922, and after hearing William P. McCool, of counsel for petitioner, in support of said writs, and Maxwell M. Mattuck, Esq., Assistant United States Attorney, [fol. 163] torney, in opposition thereto and due deliberation having been had thereon, on motion of William Hayward, United States Attorney,

Ordered, that said writs be and the same hereby are dismissed.

Enter,

Julian W. Mack, C. P.

THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

WARRANT OF REMOVAL

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to his Deputies or any or either of them:

Whereas, B. I. Salinger, Jr., has been brought before me upon a commitment made by a United States Commissioner in this District for the purpose of obtaining a warrant for the removal of the said B. I. Salinger, Jr., to the District of South Dakota, in which District the offense for which said prisoner has been so committed is to be tried, a copy of which commitment is hereto attached;

And whereas, the United States Attorney for the Southern District of New York has made application to me under the provisions of the Revised Statutes of the United States, for a warrant for the removal of said prisoner to the District of South Dakota, and an examination of the matter having been made by me;

Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South [fol. 164] Dakota and there deliver him to the United States Marshal for the District of South Dakota, or some other proper officer authorized to receive said prisoner, in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States for the Southern District of New York, at the Borough of Manhattan, City of New York, this 15th day of November, 1922.

Julian W. Mack, Circuit Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL AND ADMISSION TO BAIL PENDING APPEAL

And now comes B. I. Salinger, Jr., and respectfully represents that on the 13th day of November, 1922, a judgment was entered by this Court dismissing his petition for habeas corpus and certiorari and remanding him in custody of Hon. William Hecht, United States Marshal for the Southern District of New York, awaiting removal to the Western Division of the District of South Dakota.

And your petitioner respectfully shows that in said record proceedings and order in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury [fol. 165] of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed him from said order to the United States Circuit Court of Appeals for the Second Circuit, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal to the said Court, and that the petitioner may have thirty days to prepare and file his bill of exceptions herein.

Gilbert, Campbell & Barranco, Attorneys for Petitioner, 14 Wall Street, New York City.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

Habeas Corpus

ORDER GRANTING APPEAL AND ADMISSION TO BAIL

On reading of the petition of B. I. Salinger, Jr., for appeal and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is herewith allowed. And it appearing to the Court that a citation was duly served as provided by law, it is ordered that petitioner be admitted to bail pending [fol. 166] the final determination of this appeal in the sum of \$10,000, the appeal to operate as a supersedeas.

Costs bond on appeal is hereby fixed in the sum of \$250.00. Petitioner allowed up to and including December 13, 1922, to make and file his bill of exceptions herein.

New York, November 15, 1922.

Julian W. Mack, Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes B. I. Salinger, Jr., by Gilbert, Campbell & Barranco, his attorneys, and in connection with his petition of an appeal, says that in the record and proceedings and order aforesaid, and during the hearing of the above entitled cause in said District Court, error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and appellant, is wrongfully held and illegally imprisoned, and in dismiss-

ing his petition and remanding him into custody for removal from the Southern District of New York to the Southern Division of the District of South Dakota.

2. The Court erred in not holding that this petitioner is held and [fol. 167] imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for removal.

4. The Court erred in dismissing the petition for certiorari.

5. The Court erred in holding that the Commissioner did not err in receiving into evidence, over the objection and exception of petitioner, certified copy of indictment alleged to have been returned against this petitioner and others by the Grand Jury of the Western Division of the District of South Dakota, and in admitting to evidence certified copy of bench warrant founded on said indictment; and furthermore, in refusing to strike out the said indictment and bench warrant upon the motion of petitioner; and the Court erred further in refusing to sustain the exceptions taken by the petitioner before the Commissioner to the Commissioner's ruling admitting the said documents in evidence and in refusing to strike the same out.

6. The Court erred in refusing to hold that the said Commissioner was in error in his finding that there was probable cause to believe that the petitioner was guilty of the commission of any offense against the United States and in particular of the offense attempted to be set forth in the said indictment.

7. The Court erred in refusing to hold that the Commissioner [fol. 168] erred in his refusal to afford to the petitioner reasonable opportunity of proving that said petitioner was not guilty in fact of any crime against the United States and particularly of the crime attempted to be set forth in said indictment.

8. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

9. The Court erred in refusing to hold that said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants named therein with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any division thereof.

10. The Court erred in refusing to find that said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

11. The Court erred in refusing to find that if any offense against the laws of the United States was charged in and by said indictment at all (the petitioner maintaining that no such offense was so charged), that such facts as are charged show that no offense was committed by the petitioner or any or all of the defendants named [fol. 169] in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of the rights under Section Three of Article Three thereof.

12. The Court erred in failing to sustain the petitioner in his protest that said indictment did not charge any offense at all, and if any, none within the jurisdiction of the Court to which said Indictment was returned, and in failing to sustain the petitioner's protest that in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of the District of South Dakota whereas as it appears upon the face of the indictment said indictment was returned at and by a Grand Jury sitting in and for the Western Division of the District of South Dakota.

13. The Court erred in refusing to hold that by reason of the provisions of Section 53 of the Judicial Code of the United States the said Grand Jury sitting in and for the Western Division of the District of South Dakota was entirely without power or authority to return said indictment and said court was without power or authority to receive it and that the District Court of the United States for the Southern District of New York was for like reasons without power or jurisdiction to take any proceedings under said invalid indictment and particularly to arrest or detain or imprison your petitioner upon any warrant issued founded upon said indictment and particularly [fol. 170] without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota and in any event without power to direct the return of your petitioner to the Southern Division of the District of South Dakota in which division in any event no indictment has been found against the petitioner.

14. The Court erred in refusing to hold that the said Grand Jury sitting in and for the Western Division of South Dakota was in any event without power or authority to hear any charge against your petitioner or to return any indictment against him for the reason that said Grand Jury was illegally and unlawfully called and constituted for the reason, among others, that said Grand Jury was not composed of citizens of the United States residing within the Western Division of the District of South Dakota, but that many of the members of said Grand Jury resided in other Divisions of the District of South Dakota and that for that reason were and are disqualified from acting upon the Grand Jury sitting in and for the Western Division of South Dakota.

15. The Court erred further in refusing to hold that subject to the foregoing objections that the evidence presented before the Grand Jury as to all the counts contained in said indictment excepting counts 1, 4, and 6 thereof were insufficient to sustain the indictment for the reason, among others, that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof [fol. 171] by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay evidence of some or all of the persons whose names are indorsed on the indictment as witnesses before said Grand Jury; and furthermore, said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony and particularly because at the hearing before the Grand Jury there was introduced and used certain books and the legal custodian of said books, although subpoenaed, to appear and actually in attendance upon said Grand Jury to testify to the identity and custody of said records was not called as a witness and did not lay the foundation in the introduction or use thereof, as appears more particularly by the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment, copies of which affidavits were submitted to the Court upon the petition for habeas corpus herein.

16. The Court erred in refusing to hold that subject to grounds 1 to — inclusive hereof that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, to- vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; furthermore, that said indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations which defects when taken together render it difficult to construe and almost unintelligible [fol. 172] defrauded by your petitioner or by any of the defendants named in said indictment whether by means of the said letters or otherwise.

17. The Court erred in refusing to hold that the proceedings before the Commissioner was improperly conducted and that no proper or sufficient evidence was introduced thereon to establish that there was probable cause to believe the petitioner guilty of any crime and particularly of the alleged crime attempted to be set forth in the said indictment.

18. The Court erred in refusing to find that the Commissioner erred in refusing to dismiss the proceedings before him and in refusing to grant the motion made by petitioner to dismiss the same and the Court erred further in refusing to sustain the petitioner's exceptions to said ruling of said Commissioner.

19. The Court erred in holding that the return made by William E. Hecht, Marshal of the United States for the Southern District of New York to the writ of habeas Corpus was sufficient to create an issue and that the facts therein stated were sufficient to justify the said Marshal in detaining your petitioner.

20. The Court erred in refusing to hold that the Court had no jurisdiction of the petitioner for the reasons more particularly hereinbefore set forth and in refusing to find that the Commissioner had no power to order the arrest of your petitioner and in refusing further to find that the Marshal was without power to arrest or imprison him, or the reason that the warrant issued by said Commissioner was based solely upon an alleged indictment which was patently and [fol. 173] manifestly insufficient to charge any crime as more particularly hereinbefore set forth and therefore said warrant was and is illegal and without jurisdiction in law and the arrest made thereunder was unwarranted, unjustified and illegal.

21. The Court erred further in finding that the proceeding conducted by the Commissioner was proper and lawful and that the evidence introduced upon the hearing before the Commissioner by the Government was legal evidence and sufficient to establish there was probable cause to believe the petitioner guilty of any crime.

22. The Court erred further in refusing to sustain the petitioner's objections to the Commissioner's refusal to allow petitioner to introduce evidence to establish that he was not guilty in fact, such refusal being based upon the sole ground that the Government urged that to permit of such opportunity would inconvenience the District Attorney for the District of South Dakota without proof upon the part of the Government that the affording of such reasonable opportunity would in any wise prejudice the United States of America.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

Gilbert, Campbell & Barranco, Attorneys for Petitioner and Appellant.

MEMO. AS TO BOND

Approved appeal and supersedeas bail bond, filed Nov. 14, 1922. (not printed).

[fol. 174] CITATION ON APPEAL—Omitted in printing

[fol. 175] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

CLERK'S MEMO. ON DOCKET

Docket Entries

Attorneys: Gilbert, Campbell & Barranco, 14 Wall St., N. Y. C.
1922.

Nov. 8. Filed, Petition for Habeas Corpus and Certiorari and issued Writ—Ret. 11, 13, 22.

Nov. 9. Filed, Bond, \$10,000—Southern Surety Co.

Nov. 11. Filed, Affdt. of U. S. Marshal, S. D. of N. Y. as to dismissing Writ.

Nov. 14. Filed, Affdt. of U. S. Marshal, Wm. C. Hecht.

Nov. 14. Filed, Order dismissing Writs.

Nov. 14. Filed, Assignment of Errors.

Nov. 14. Filed Petition and order allowing appeal.

Nov. 14. Filed, Writ of Certiorari.

Nov. 14. Filed, Writ of H. C.

Nov. 14. Filed, Citation on appeal to C. C. A. Ret.

Nov. 17. Filed, Bond—\$10,000—Southern Surety Co.

Nov. 8. Filed, Bond for Costs \$250—Southern Surety Co.

Dec. 12. Filed, And issued Writ of Error.

A true copy.

Alexander Gilchrist, Jr., (Clerk). (Seal.)

[fol. 176] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ORDER TO CERTIFY RECORD

On reading the annexed præcipe and stipulation dated December 26, 1922, by and between the attorneys for petitioner and the United States Attorney, in the above case, it is

Ordered, that the clerk certify the transcript of record on the appeal taken by the plaintiff from order dismissing writs of habeas corpus and certiorari in accordance with said stipulation and præcipe.

Dated, N. Y., December 27, 1922.

J. W. Mack, U. S. C. J.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD

It is hereby stipulated that the clerk of the District Court of the United States for the Southern District of New York may certify the transcript of record on the appeal in accordance with the præcipe hereto annexed.

[fol. 177] Dated, December 26, 1922.

Gilbert, Campbell & Barranco, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

Counsel for the respective parties agree that the following and no other papers constitute the transcript of record:

Indictment, complaint, warrant, commitment, bench warrant, bill of exceptions, petition for leave to appeal, order allowing appeal, assignment of errors, petition for writ of habeas corpus and certiorari, writ of error, orders extending time to file record, writ of habeas corpus, writ of certiorari, return to writs, warrant of removal, order dismissing writs, citation on appeal, præcipe, stipulation on præcipe, order approving præcipe, stipulation re certification, clerk's certificate.

Dated, December 26, 1922.

Gilbert, Campbell & Barranco, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

[fol. 178] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York,

do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 27th day of December, in the year of our Lord One Thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

Alexander Gilchrist, Jr., Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 140 inclusive, contain a true and complete transcript of the record on appeal filed in this Court in the case of [fol. 179] In the matter of: B. I. Salinger, Jr., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit this 13th day of April in the Year of our Lord One Thousand Nine Hundred and Twenty-three and of the Independence of the United States the one hundred and forty-seventh.

(Signed) Wm. Parkin, Clerk. (Seal.)

EXHIBIT IN EVIDENCE: BOND ON REMOVAL TO THE DISTRICT OF
SOUTH DAKOTA

Filed April 20, 1923

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered that on this 20th day of March, in the year of our Lord, one thousand nine hundred and twenty three, before me Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit, personally came B. I. Salinger, Jr., principal, and Southern Surety Company of Des Moines, Iowa, Surety, and acknowledged themselves to owe to the United States of America, that is to say, the said B. I. Salinger, Jr., the sum of Fifteen thousand (\$15,000) Dollars, and the said Southern Surety Company of Des Moines, Iowa, the sum of fifteen thousand (\$15,000) Dollars separately to be levied and made [fol. 180] of their respective goods and chattels, lands and tenements to use of the said United States of America, if default shall be made in the following conditions following, to-wit:

Now therefore the conditions of this recognizance are such that if the said B. I. Salinger, Jr., shall appear for trial at the District Court of the United States for the District of South Dakota, to be holden at the City of Sioux Falls in said District on the First Tuesday of April, 1923, at 10:30 o'clock in the forenoon of said day, upon an indictment filed in said district, Southern Division, and shall appear before said District Court of the United States for the District of South Dakota, on such day or days thereafter as said District Court may order, and shall at all times render himself amenable to the order and process of the said Court, to answer all such things and matters as shall be objected against him, and not depart the jurisdiction of the Court without leave; and if convicted shall appear for judgment, and render himself in execution thereof upon such day as said District Court may order, then this recognizance to be void, otherwise to remain in full force and virtue.

B. I. Salinger, Jr., Principal. Southern Surety Company.
By Hulbert T. C. Beardsley, Attorney in Fact. (Seal.)

Acknowledged before me the day and year first above written.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York.

[fol. 181] A true copy.

(Signed) Alex. Gilchrist, Jr., Clerk. (Seal.)

EXHIBIT IN EVIDENCE: COPY OF ORDER ON MANDATE OF U. S.
CIRCUIT COURT OF APPEALS, SECOND CIRCUIT—Filed April
20, 1923

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to-wit, Order on Mandate, in case of B. I. Salinger, Jr., Miscellaneous Docket 7/356, filed in this Court on March 16, 1923, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals. In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this second day of April, in the year of our Lord, One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

(Signed) Alex. Gilchrist, Jr., Clerk. (Seal.)

AT A STATED TERM OF THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK HELD AT THE UNITED
[fol. 182] STATES COURT HOUSE AND POST OFFICE BUILDING, IN THE
BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 16TH DAY
OF MARCH, 1923

Present: Hon. Augustus N. Hand, District Judge.

M 7-356

In the Matter of B. I. SALINGER, JR., Petitioner in Habeas Corpus

This cause having heretofore come on for hearing in this Court upon writs of habeas corpus and certiorari allowed to the above named B. I. Salinger, Jr., and an order having been entered in said cause dismissing said writs, and the said B. I. Salinger, Jr., having thereafter by an appeal obtained a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals having transmitted to this Court its mandate dated March 14th, 1923, by which it appears that, at the October Term of said Court for 1922, this cause came on to be heard and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the order of said District Court be affirmed and that such further proceedings be had in said cause, in accordance with the decision of the said United States Circuit Court of Appeals as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now upon reading and filing said mandate and upon motion of William Hayward, United States Attorney for the Southern District of New York, it is hereby

[fol. 183] Ordered, adjudged and decreed that the judgment and order of the said United States Circuit Court of Appeals in this Cause be and the same is hereby made the judgment of this Court, and it is further

Ordered that the said B. I. Salinger, Jr., personally surrender himself into the custody of the United States Marshal for the Southern District of New York, New York, N. Y., on or before the 19th day of March, 1923, at 10:30 o'clock in the forenoon, and that the said United States Marshal transport the said B. I. Salinger, Jr., to the District of South Dakota, and there deliver the said B. I. Salinger, Jr., into the custody of the United States Marshal for said District, then and there to be dealt with according to law.

(Signed) Augustus N. Hand, United States District Judge.

EXHIBIT IN EVIDENCE: MINUTE ENTRIES OF U. S. DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA—Filed April 20, 1923

In the District Court of the United States of America in and for the
Southern Division of the District of South Dakota

At a session of the District Court of the United States for the District of South Dakota, continued and held pursuant to adjournment, in the United States Court Room, in the City of Sioux Falls, in the District of South Dakota, on the 3rd day of April, A. D. 1923, the [fol. 184] Honorable James D. Elliott, Judge, being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

[Title omitted]

Order Setting Certain Motions for Hearing

Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the arraignment of the defendant, B. I. Salinger, Jr., and said defendant not appearing in Court, and having been three times severally called at the Court room door by the United States Marshal to appear in Court, as he was bound to do, or forfeit his bond, and having made default said United States District Attorney S. W. Clark, Esq., moves the Court for the forfeiture of the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, heretofore given for his appearance before this Court at this time; and said United States District Attorney also moves the Court for a bench warrant to issue forthwith for the arrest of said defendant; whereupon, it is ordered, by the Court, that the hearing on said motions, be and the same is hereby set down for April 4th, A. D. 1923, at two o'clock in the afternoon, and the United States District Attorney is directed to so notify the attorney for said defendant.

And afterwards, to-wit, on the 4th day of April, A. D. 1923, the following among other proceedings were had and done, to-wit:

[fol. 185] Indictment No. 1978, S. D.

[Title omitted]

Order Forfeiting Bail Bond

This being the time fixed by the Court for hearing, the motion for the forfeiture of the bail of defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, under Indictment No. 1978 S. D., and the matter coming on for hearing, the Court directs the Marshal

to call said defendant three times at the door of the Court room, the Marshal reports that he has so called the said defendant and that said defendant failed to appear; and the United States District Attorney, S. W. Clark, Esq., having renewed his motion for the forfeiture of the bail bond of B. I. Salinger, Jr., which had heretofore been presented to this Court in the sum of Fifteen Thousand Dollars, conditioned for the appearance of B. I. Salinger, Jr., before this Court on the 3rd day of April, A. D. 1923, at the opening of the term, the Court states that in his opinion the defendant has not only disregarded his duty under his obligation, as set forth in the terms of this bond to appear here, but that he has resorted, to say the least, to most questionable methods; that he has no confidence whatever in the position assumed by counsel for defendant that this defendant could by collusion with a bonding company go to a distant jurisdiction and surrender himself there and that a United States Commissioner could fix a bond of \$5,000.00, the terms of which are entirely unknown to this jurisdiction at this time, and thereby relieve him from the necessity of fulfilling the obligation [fol. 186] of this bond by surrendering himself here for trial; whereupon, it is ordered by the Court, that the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, conditioned as above stated be, and the same is hereby forfeited; and it is further ordered that the Clerk of this Court file the telegrams presented by the United States Attorney relating to the present whereabouts of said defendant.

And, to-wit, on the same day, the following among other proceedings were had and done, to-wit:

[Title omitted]

Order for Bench Warrant

Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the Court for the issuance of a bench warrant for the arrest of B. I. Salinger, Jr., by reason of the forfeiture of his bond, and the fact that he is under indictment and has not responded; whereupon, it is ordered by the Court, that a warrant issue forthwith for the arrest of the said defendant, B. I. Salinger, Jr., returnable forthwith at Sioux Falls, South Dakota.

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that the above and foregoing are true copies of the entries made upon the Journal of the proceedings of said Court, in the case therein entitled; that [fol. 187] I have compared the same with the original entries thereof, and the same is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said Court, at Sioux Falls, this 5th day of April, A. D. 1923.

(Signed Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal.)

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
 Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his deputies or any or either of them:

Whereas: Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner, for the purpose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

And whereas the assistant United States attorney for the Eastern [fol. 188] District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me: Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States, for the Eastern District of Louisiana, at the City of New Orleans, this 20th day of April, 1923.

(Signed) Rufus E. Foster, Judge.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

FINAL MITTIMUS

UNITED STATES OF AMERICA,
 Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the Keeper of the House of Detention in the City of New Orleans, Greeting:

Whereas, Ben I. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May,

1922, in said District, in violation of Sec. 215 CC. of the United States, unlawfully used the mails with a scheme to defraud.

[fol. 189] And, after an examination being this day had by me, it appearing to me that said offense had been committed and probable cause being shown to believe said Ben I. Salinger, Jr., committed said offense as charged, I have directed that said Ben I. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 day of April, 1923, and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben I. Salinger, Jr., to the custody of the keeper of said jail of the city of New Orleans, and to leave with said jailer a certified copy of this writ; and to command you, the keeper of said jail of said city, to receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District this 18 day of April, A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

Received this Mittimus with the within named Prisoner, on the 18 day of April, A. D. 1923, and on the same day I committed the said Prisoner to the custody of the jail keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus. [fol. 190] Dated April 18, 1923.

(Signed) Victor Loisel, United States Marshal, Eastern District of Louisiana.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

[Title omitted]

Extract from the Judgment Book, February Term, 1923

JUDGMENT

New Orleans, Thursday, April 26th, 1923.

This cause came on at a former day to be heard upon the application of the relator for a writ of habeas corpus herein and after hearing the pleadings and the evidence and testimony offered on behalf of the respective parties, and arguments of counsel the cause was submitted when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the reasons of the Court orally assigned;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the [fol. 191] application of the relator for a writ of habeas corpus be, and the same is hereby denied, that the said petition of the relator be dismissed with costs and that the said relator Ben. I. Salinger, Jr., be remanded to the custody of Victor Loisel, United States Marshal, for this District.

Judgment rendered April 26th, 1923.

Judgment signed April 26th, 1923.

(Signed) Rufus E. Foster, Judge.

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed April 26, 1923

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division.

The undersigned petitioner, B. I. Salinger, Jr., feeling himself [fol. 192] aggrieved by the proceedings, orders and rulings had in the District Court of the United States for the Eastern District of Louisiana, in a case therein pending, entitled "In the Matter of the Petition of B. I. Salinger, Jr., for writs of habeas corpus and certiorari," and numbered therein 17238 and particularly by an order of said Court rendered and entered therein on the twenty-sixth day of April, A. D. 1923, ordering that the writs of habeas corpus and certiorari heretofore issued therein on behalf of said petitioner be dismissed, and dismissing the same, hereby prays that an appeal by writ of error from said judgment may be allowed to him to the said Supreme Court of the United States in accordance with law and the rules and practices of said Supreme Court and that upon the service of citation, the said appeal may operate as supersedeas until the final disposition of the case by the Supreme Court of the United States.

And in support of this petition, your petitioner herewith presents and files his assignments of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner. (Signed) St. Clair Adams, His Attorney.

[fol. 193] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day, this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal by Writ of Error to the Supreme Court of the United States for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith.

It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served and returned, in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States, and that to effect said supersedeas the said [fol. 194] B. I. Salinger, Jr., shall enter into an undertaking in the sum of One Hundred Dollars, with sureties to be approved by this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of a supersedeas bail bond in the penal sum of Fifteen thousand Dollars, with sureties to be approved by the Clerk of the United States District Court, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said Court and not depart the same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at New Orleans, La., this 27 day of April, A. D. 1923.

(Signed) Rufus E. Foster, Judge United States District Court,
Eastern District of Louisiana.

[fol. 195] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 27, 1923

Now comes the petitioner above named and in connection with his petition for appeal by writ of error, in the above entitled cause, filed herewith his assignment of errors which he says occurred in the proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings

therein had and entered; and says that there was and is manifest error appearing upon the face of the record, and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into the custody for [fol. 196] removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred especially in ordering the removal of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of Section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed, and to transfer for trial to the division in which it is charged the offense was committed—wherefore, the Court erred, in any view in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota in which it is charged the offense was committed.

5. The Court erred in following the *Biggerstaff v. U. S.* (C. C. A.) 260 Fed. p. 926, which in passing upon the provision of said Section 53, that "all prosecutions shall be had in the Division in which [fol. 197] committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division wherein it is charged the offense was committed and said decision is in opposition to the decision of the Supreme Court of the United States in *Post v. U. S.* 161 U. S. 583; 16 Sup. Ct. 611; *Virginia* 148 U. S. 107; 13 Sup. Ct. 586 and *Chennault v. U. S.* 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and, as well, contrary to reason.

6. The *Biggerstaff* case should not have been followed for the further reason that it proceeds in contradiction of the rules that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 215.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charge nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth Amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the Court erred because it disregarded the decision in *Stever v. U. S.* 222, U. S. 167, and in *U. S. v. Stewart* (C. C. A.) 119, Fed. 89, and *U. S. v. Conrad*, 59 Fed. 485—and disregarded the provisions of the fifth and sixth amendments to and Section three of Article three of the Constitution of the United States.

9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two *coindictes*, and in failing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by way of the letters counted on other than those which it is charged he himself wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it *it is* be said that in the *Stever* case, there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment be assumed, the only overt acts charged to be in execution of the scheme or conspiracy in mailing, etc., at Sioux City, Iowa.

[fol. 199] 13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the plea that these letters were in execution or attempted execution of the scheme and artifice described in the indictment; and it erred in failing and refusing to hold that said letters and each of them showed on their face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged

scheme for in that, the indictment charges said sales to be part of the scheme and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the Court in acting under it deprived petitioner of the rights guaranteed to him by the eighth amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge [fol. 200] this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegation, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendant named in said indictment, whether by means of the said scheme and said letters or otherwise.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

(Signed) St. Clair Adams, Attorney for Plaintiff in Error.

[fol. 201]

[Title omitted]

BAIL BOND—Filed April 27, 1923

Know all men by these presents: That we, B. I. Salinger, Jr., as principal and Southern Surety Company, herein represented by J. H. Bodenheimer, agent and attorney in fact, as surety, are held and firmly bound unto the United States of America, in the full sum of Five Thousand (\$5,000.00) Dollars, to be paid to the said

United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals, and dated this 27th day of April, in the year of our Lord, 1923.

Whereas, B. I. Salinger, Jr., has been granted an order of appeal herein to the Supreme Court of the United States in the above entitled cause; and given the notice of the taking of such appeal.

Now, the condition of the above obligation is such that if the said B. I. Salinger, Jr., shall be and appear before the said Supreme Court of the United States, at and during the present term thereof, and from day to day thereafter, and shall be and appear before the [fol. 202] said Court at the next regular or special term thereof, on the first day thereof, and from day to day thereof and term to term thereafter until finally discharged therefrom, and to abide the order and judgment of the said United States Supreme Court, and not to depart the Court without leave, and shall further abide by and obey all orders made by the said Supreme Court of the United States in this cause, and shall surrender himself in execution of the judgment appealed from as said Court may direct if the judgment of said U. S. District Court, Eastern District of Louisiana, New Orleans, in this cause, shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

(Signed) B. I. Salinger, Jr., By St. Clair Adams, Attorney.

(Signed) Southern Surety Co., By J. H. Bodenheimer

(Seal), Agent & Attorney in Fact.

Approved:

(Signed) H. J. Carter, Clerk, U. S. District Court.

APPEAL BOND—Filed April 27th, 1923

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and Southern Surety Company, herein represented by J. H. [fol. 203] Bodenheimer, as surety, are held and firmly bound unto the United States of America, and Victor Loisel, as Marshal thereof, for the Eastern District of Louisiana, in the full and just sum of One hundred (\$100.00) dollars to be paid to the said United States of America, and Victor Loisel, as Marshal thereof, for the Eastern District of Louisiana, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these present. Sealed with our seals and dated this 27th day of April, in the year of our Lord, one thousand nine hundred and twenty three.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between B. I. Salinger, Jr., plaintiff

and the United States of America, and Victor Loisel, as Marshal thereof for the Eastern District of Louisiana, defendants, a judgment was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., having obtained an order of appeal, and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, and Victor Loisel, as Marshal of the United States for the Eastern District of Louisiana, citing and admonishing them to be and appear before the United States Supreme Court, to be holden at Washington, D. C., within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said B. I. Salinger, Jr., shall prosecute said appeal to effect, and [fol. 204] answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Scaled and delivered in presence of—

(Signed) B. I. Salinger, Jr., (Seal), By St. Clair Adams
(Seal). (Signed) Southern Surety Co. (Seal), By J. H.
Bodenheimer (Seal), Agent & Atty. in Fact.

Approved by—

(Signed) Rufus E. Foster, Judge.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS No. 17238—Filed April
18, 1923

To the Honorable the District Court of the United States in and
for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa,
and is a citizen of said State and of the United States of America.

[fol. 205] 2. That petitioner is now actually imprisoned and re-
strained of his liberty and detained by color of the authority of the
United States in the custody of Victor Loisel, Esquire, United States
Marshal in and for the Eastern District of Louisiana, to-wit; at the
City of New Orleans in the said District.

3. That the sole claim and the sole authority by virtue of which
the said Victor Loisel, Marshal as aforesaid, so restrains and detains
your petitioner, is a certain paper which purports to be a commit-

ment in writing, a copy of which is hereunto annexed and marked for identification herewith Petitioner's Exhibit "A."

4. That, upon information and belief, the said commitment was issued by Arthur H. Brown, Esquire, United States Commissioner by virtue of a certain indictment found against petitioner in the proceeding entitled "United States versus B. I. Salinger, Jr., No. 983 W. D. in the District Court of the United States for the District of South Dakota, Western Division," charging petitioner with the violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto annexed as part hereof and for identification herewith marked "Petitioner's Exhibit B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever [fol. 206] with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him (and as to them he cannot say for he has not been permitted any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa for he was never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one, nor at the time of nor since the return of said indictment.

6. That said indictment is void and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against [fol. 207] the United States or any law thereof within the Western Division of the District of South Dakota.

(d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution of furtherance of any scheme to defraud, because the indictment and said letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section two of Article Three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that it founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power — direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention, removal or trial under said indictment, or by virtue of any process thereunder, would be in violation of the Fifth and Sixth Amendments to and of Section Two of Article Three of the Constitution of the United States.

7. That petitioner shows further than no motion has ever been made by him or for him with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District, and without his motion or consent, the said indictment and all proceed-

ings thereunder, were upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South [fol. 209] Dakota, transferred to that last named division, and that petitioner's detention for the removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

8. Upon information and belief, the said commitment is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the statutes of the United States, and will, if the writ herein prayed for be not granted, be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within the said District of South Dakota.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue directed to the said Arthur H. Brown, Esquire, United States Commissioner for the Eastern District of Louisiana directing him to certify to this Court all the proceedings that took place before him and all the evidence that was offered before him in the said [fol. 210] proceedings which resulted in the issue of the said commitment; and that this Court may proceed in the summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the eighteenth day of April, A. D. 1923.

(Signed) St. Clair Adams, Attorney for Petitioner.

Jurat showing the foregoing was duly sworn to by B. I. Salinger, Jr. omitted in printing.

[fol. 211] IN UNITED STATES DISTRICT COURT, EAST DIST. OF LA.

ORDER ISSUING WRIT

Now on this eighteenth day of April, A. D. 1923, the above matter coming on upon the petition for the issuance of a writ of habeas

corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this Court at 11 o'clock, A. M., of the 20th day of April, A. D. 1923; and the petitioner is hereby admitted to bail pending said hearing in the sum of Fifteen Thousand 00/100 Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the Court may from time to time direct; and it is hereby further ordered that writ of certiorari issue herein, directed to Arthur H. Brown, Esquire, United States Commissioner for the Eastern District of Louisiana directing him to certify to this Court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings which resulted in the issuance of the said commitment, returnable to and before this Court at 11 o'clock A. M. of the 20th day of April, A. D. 1923.

By the Court.

(Signed) Rufus E. Foster, Judge.

[fol. 212] REPORT OF HEARING APRIL 20, 1923—Filed May 2, 1923

No. 17,238

[Title omitted]

Proceedings Had in the Above Entitled and Numbered Matter on Hearing in Open Court Before the Hon. Rufus E. Foster, Judge, on the 20th Day of April, 1923.

Proceedings on hearing for Writ of Habeas Corpus in cause #17238 identical with proceedings in cause #17233 heretofore copied at page 96.

* * * * *

EXHIBIT IN EVIDENCE: BENCH WARRANT—Filed April 20, 1923

(Signed) By Jerry Carleton, Clerk

UNITED STATES OF AMERICA,
District of South Dakota:

To the Marshal of the United States for the District of South Dakota and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for [fol. 213] the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid on the 20th day of May, A. D., 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against, B. I.

Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid, the bail bond of said defendant having been this day forfeited by order of the Court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 4th day of April, A. D. 1923.

(Sgd.) Jerry Carleton, Clerk, By C. C. Schwartz, Deputy.
(Seal of Court.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received the within warrant on the 4th day of April, 1923, and after a due and diligent search I am unable to find the within-named defendant Ben I. Salinger, Jr., within this District.

W. H. King, United States Marshal, By N. H. Jensen, Deputy.

[fol. 214] UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District this 5th day of April, A. D. 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwartz, Deputy
(Seal.)

IN UNITED STATES DISTRICT COURT

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his Deputies or any or either of them:

Whereas: Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner, for the pur-

pose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota, in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

[fol. 215] And whereas the assistant United States Attorney for the Eastern District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me; Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States, for the Eastern District of Louisiana, at the city of New Orleans, this 26th day of April, 1923.

(Signed) Rufus E. Foster, Judge.

IN UNITED STATES DISTRICT COURT

FINAL MITTIMUS

UNITED STATES OF AMERICA,

Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana, and to the Keeper of the House of Detention in the City of New Orleans, Greeting:

Whereas, Ben I. Salinger, Jr., has been arrested upon oath of L. [fol. 216] P. Bryant, Jr., for having, on or about the 20 day of May, 1922, in said District, in violation of Sec. 216 CC. of the United States, unlawfully use the mails with a scheme to defraud.

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben I. Salinger, Jr., committed said offense as charged, I have directed that said Ben I. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 day of April, 1923, and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben I.

Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you, the Keeper of said Jail of said City, to receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District this 18 day of April, A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

[fol. 217] Received this Mittimus with the within named prisoner, on the 18 day of April, A. D. 1923, and on the same day I committed the said prisoner to the custody of the jail keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated April 18, 1923.

(Signed) Victor Loisel, United States Marshal, Eastern District of Louisiana.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA

[Title omitted]

RETURN OF U. S. COMMISSIONER—Filed April 20, 1923

Return of Commissioner to the District Court of the United States for the Eastern District of Louisiana in Response to the Writ of Certiorari Issued Out of said Court on the 18th Day of April, 1923.

Comes now Arthur H. Browne, United States Commissioner for the Eastern District of Louisiana, and in response to the writ of certiorari to him directed by the Honorable Rufus E. Foster, Judge of said District Court, of date April 18th, 1923, shows the following proceedings had before him as such Commissioner in the above matter.

[fol. 218] April 6th, 1923.—Verified complaint filed by L. P. Bryant, Jr., Assistant United States Attorney for the Eastern District of Louisiana, same being hereto attached together with a certified copy of the indictment referred to in said complaint.

April 6th, 1923.—Warrant of arrest issued and placed in hands of Marshal for service, same being hereto attached;

April 6th, 1923.—Defendant B. I. Salinger, Jr., was brought before me by the United States Marshal for the Eastern District of Louisiana, under the warrant of arrest above specified, and arraigned, whereupon he applied for bond and bond for his appearance was

fixed in the sum of \$15,000. Defendant gave bond for his appearance before me in said sum \$15,000, and the case was subsequently fixed for hearing before me on April 16th, 1923, at 11:00 a. m. and thereafter the hearing was continued by me to April 18, 1923 owing to the fact that the accused was unable to be present.

Plaintiff appeared through L. P. Bryant, Jr., Assistant United States Attorney for the Eastern District of Louisiana, and S. W. Clark, United States Attorney for the District of South Dakota, and defendant appeared, in person, and by his attorney, St. Clair Adams, and the following proceedings were had:

Defendant made an application for a continuance but upon objection to same by plaintiff and no good cause being shown for continuance, motion was denied:

Plaintiff offered in evidence the certified copy of the indictment returned by the Grand Jury for the District of South Dakota, attached to the complaint and hereinbefore referred to. No objection on the part of the defendant and same was received.

[fol. 219] Plaintiff offered in evidence certified copy of bench warrant issued by Honorable James D. Elliott, United States District Judge, District of South Dakota, of date April 4th, 1913. No objection and same was received in evidence and is hereto attached.

Request being made of defendant's attorney as to whether he would admit defendant's identity, he refused to admit identity and thereupon oral evidence was received proving the identity of defendant with the person named in the indictment, and documentary evidence in the form of a certified copy of the petition for writ of habeas corpus theretofore filed in the United States District Court for the Eastern District of Louisiana by the defendant, B. I. Salinger, Jr., wherein he declares himself to be one and the same party as the B. I. Salinger, Jr., referred to in the indictment returned by the Grand Jurors for the District of South Dakota, certified copy of which said petition for writ of habeas corpus is hereto attached and made part of this return.

After reception of above evidence the Government rested its case:

The defendant did not offer any evidence, and it appearing to the Commissioner that there is probable cause to believe that a public offense has been committed, as specified in the complaint and indictment, and that the defendant, B. I. Salinger, Jr., is guilty thereof, thereupon, it was, by the Commissioner ordered, that the said B. I. Salinger, Jr., be committed to the District Court for the Eastern District of Louisiana, to await further action by said Court in accordance with law.

[fol. 220] A commitment was thereupon issued in the form of the copy hereto attached, and delivered to the United States Marshal for the Eastern District of Louisiana, for the detention of the said B. I. Salinger, Jr.

Neither party requested stenographic notes as to oral testimony taken and record was not kept thereof.

The foregoing, together with the Exhibits hereto attached, constitutes a full and complete record of the proceedings had before me

in the above entitled matter, all of which is herewith transmitted to the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana in response to the writ of certiorari to me directed.

Given under my hand and seal, this 18th day of April, 1923.

(Signed) A. H. Browne, U. S. Commissioner. (Seal.)

Petition for writ of habeas corpus in cause No. 17,238 omitted from the printed record, having been heretofore copied at page 204.

* * * * *

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF
LOUISIANA, NEW ORLEANS DIVISION

Clerk's Office

I certify the foregoing to be a true copy from the original record in this office.

[fol. 221] Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 18 day of April, A. D. 1923.

(Signed) H. J. Carter, Clerk. (Seal.)

—

Commitment omitted from the printed record, having been heretofore copied at page 215.

* * * * *

—

Bench Warrant issued in District of S. Dakota omitted from the printed record, having been heretofore copied at page 212.

* * * * *

—

BOND FOR APPEARANCE

UNITED STATES COURTS.

Eastern District of Louisiana,
City of New Orleans, ss:

Be it remembered, that on this 6th day of April, 1923, A. D., before me, Henry J. Carter, a Clerk of the District Court of the United States for the said Eastern District of Louisiana, personally came B. I.

Salinger, Jr., residing at Sioux City, Iowa, as Principal, American Surety Company of New York, a Corporation, as Surety, and, jointly and severally acknowledged themselves to owe the United States of America the sum of Fifteen Thousand (\$15,000.00) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

[fol. 222] The condition of the Recognizance is such, that if the said B. I. Salinger, Jr., shall personally appear before the United States Commissioner for the Eastern Dist. of La. in and for the District aforesaid, at New Orleans, La., at 11 A. M., on the 16 day of April, A. D. 1923, and from day to day thereafter until lawfully discharged, and then and there to answer the charge of having on or about the — day of — within said district, in violation of Section 215 C. C. of the Revised Statutes of the United States, unlawfully — and then and there abide the judgment of the said Court and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

(Signed) B. I. Salinger. (L. S.) (Signed) American Surety Company of New York, By Chas. Hoffmann, Resident Vice-Pres. Attest: F. M. Cobb, Resident Assistant Secretary. (Seal.)

Taken and acknowledged before me on the day and year first above written.

(Signed) H. J. Carter, Clerk, U. S. District Court, E. D. of La. (Seal.) (Signed) H. C. Moseley, (Signed) W. L. Brown, Notaries.

[fol. 223] Sworn to and subscribed before me, this 6 day of April, A. D. 1923. (Signed) A. H. Browne, U. S. Commissioner for the Eastern District of La.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

No. 7554.

[Title omitted]

WARRANT FOR ARREST

The President of the United States of America to the U. S. Marshal for the Eastern District of Louisiana or either of his lawful Deputies, Greeting:

You are hereby commanded to take and apprehend and bring before me the body of Ben I. Salinger, Jr., at my office then and there to answer to a charge on affidavit hereto annexed made against said Ben I. Salinger, Jr., per notary, Sec. 215 C. C. And what you do in the premises make return to me.

[fol. 224] Witness my hand in the City of New Orleans, State of Louisiana, this 6 day of Apr., 1923.

(Signed) A. H. Browne, United States Commissioner. (Seal.)

UNITED STATES OF AMERICA,
Eastern District of Louisiana
New Orleans Division, ss:

No. 7554

AFFIDAVIT OF L. P. BRYANT, JR.

Before me, Arthur Horace Browne, a United States Commissioner for the Eastern District of Louisiana, New Orleans Division, personally appeared this day L. P. Bryant, Jr., who being first duly sworn, deposes and says that on or about the 20th day of May, A. D. 1922, at Sioux Falls, South Dakota, in the Western District of South Dakota an indictment was duly filed by the Grand Jury, indorsed as Number 983 of the Docket of United States District Court for said District in which *are* Ben I. Salinger, Jr., was made defendant, and charged with others therein named with having devised a certain scheme to defraud and in the execution thereof with having unlawfully, feloniously and knowingly, caused to be mailed and delivered by United States Mail certain numerous letters described in the various counts of said indictment, all in violation of Sec. 215 of the United States Criminal Code, which said indictment is referred to as part hereof, that the said Salinger is a fugitive from Justice and now within the Eastern District of Louisiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

[fol. 225] Deponent further says that he has reason to believe that S. W. Clark ——— are material witnesses to the subject matter of the complaint.

(Deponent's signature:) (Signed) L. P. Bryant, Jr. (Seal.)

Sworn to before me, and subscribed in my presence, this 6 day of Apr., A. D. 1923. (Signed) A. H. Browne, United States Commissioner. (Seal.)

NOTE.—Certified copy of the Indictment returned in the District Court of the United States for the Western Division of the District of South Dakota, on May 3rd, 1922, same as the copy of Indictment copied at page 13 of this transcript.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

This cause came on at a former day to be heard upon the application of the relator for a writ of habeas corpus herein, and after [fol. 226] hearing the pleadings and the evidence and testimony offered on behalf of the respective parties, and arguments of counsel, the cause was submitted when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the reasons of the Court orally assigned;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the application of the relator for a writ of habeas corpus be and the same is hereby denied, that the petition of the relator be dismissed with costs, and that the said relator, Ben I. Salinger, Jr., be remanded to the custody of Victor Loisel, United States Marshal for this District.

Judgment rendered April 26th, 1923.

Judgment signed April 26th, 1923.

(Signed) Rufus E. Foster, Judge.

[fol. 227] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

April 27th, 1923.

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

The undersigned petitioner, B. I. Salinger, Jr., feeling himself aggrieved by the proceedings, orders and rulings had in the District Court of the United States for the Eastern District of Louisiana, in a case therein pending, entitled "In the Matter of the Petition of B. I. Salinger, Jr., for writs of habeas corpus and certiorari," and numbered therein 17238, and particularly by an order of said Court rendered and entered therein on the twenty-sixth day of April, A. D. 1923, ordering that the writs of habeas corpus and certiorari heretofore issued therein on behalf of said petitioner be dismissed, and dismissing the same, hereby prays that an appeal by writ of error from said judgment be allowed to him to the said Supreme Court of the United States, in accordance with law and the rules and practices of said Supreme Court and that upon the service of citation, the said appeal may operate as supersedeas until the final disposition [fol. 228] of the case by the Supreme Court of the United States.

And in support of this petition, your petitioner herewith presents and files his assignment of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner. (Signed) St. Clair Adams,
His Attorney.

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day, this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal by Writ of Error to the Supreme Court of the United States for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith.

[fol. 229] It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served and returned, in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States, and that to effect said supersedeas the said B. I. Salinger, Jr., shall enter into an undertaking in the sum of One Hundred Dollars, with sureties to be approved by this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of a supersedeas bail bond in the penal sum of Fifteen thousand Dollars, with sureties to be approved by the Clerk of the United States District Court, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said Court and not depart the same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at New Orleans, La., this 27th day of April, A. D. 1923.

Signed Rufus E. Foster, Judge United States District Court,
Eastern District of Louisiana.

[Vol. 230] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 27, 1923

Now comes the petitioner above named and in connection with his petition for appeal by Writ of Error, in the above entitled cause, filed herewith his Assignment of Errors, which he says occurred in the proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings therein had and entered; and says that there was and is manifest error appearing upon the face of the record, and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into custody for removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

[Vol. 231] 2. The Court erred in not holding that this petitioner was held and imprisoned without due process of law and in violation of the Constitution of the United States and the amendments thereto.

3. The Court erred especially in ordering the removal of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed, and to transfer for trial to the division in which it is charged the offense was committed—wherefore, the Court erred, in any view in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota in which it is charged the offense was committed.

5. The Court erred in following the *Biggerstaff v. U. S.* (C. C. A. 260 Fed. p. 926, which in passing upon the provision of said Section 53, that "all prosecutions shall be had in the Division in which committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division wherein it is charged the [Vol. 232] offense was committed and said decision is in opposition

to the decision of the Supreme Court of the United States in *Post v. U. S.*, 161 U. S. 583; 16 Sup. Ct. 611; *Virginia* 148 U. S. 107; 13 Sup. Ct. 586 and *Chennault v. U. S.* 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation and the rules of construction of statutes, and, as well, contrary to reason.

6. The *Biggerstaff* case should not have been followed for the further reason that it proceeds in contradiction of the rule that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 215.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the Court erred because it disregarded the decision in *Stever v. U. S.* 22, U. S. 167 and in *U. S. v. Stewart* (C. C. A.) 119 Fed. 89 and *U. S. v. Conrad*, 59 Fed. 485—and disregarded the provisions of the fifth and sixth amendments to and Section three of Article three of the Constitution of the United States.

[fol. 233] 9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two co-indictees, and in failing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by any of the letters counted on other than those which it is charged he himself wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it is to be said that in the *Stever* case, there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indict-

ment be assumed, the only overt acts charged to be in execution of the scheme or conspiracy is mailing, etc., at Sioux City, Iowa.

13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the pleader that these letters were in execution or attempted execution of the scheme and artifice described in the indictment; and it erred in failing and refusing to [fol. 234] hold that said letters and each of them showed on their face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged scheme for in that, the indictment charges said sales to be part of the scheme and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the Court in acting under it deprived petitioner of the rights guaranteed to him by the eighth amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishment [fol. 235] ishable under any of the laws of the United States.

18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegation, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment, whether by means of the said scheme and said letters or otherwise.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

(Signed) St. Clair Adams, Attorney for Plaintiff in Error.

[fol. 236] U. S. DISTRICT COURT, E. DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

[Title omitted]

BAIL BOND—Filed April 27th, 1923

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and Southern Surety Company, herein represented by J. H. Bodenheimer, agent and attorney in fact, as surety, are held and firmly bound unto the United States of America, in the full sum of Fifteen Thousand (\$15,000.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals, and dated this 27th day of April, in the year of our Lord, 1923.

Whereas, B. I. Salinger, Jr., has been granted an order of appeal herein to the Supreme Court of the United States, in the above entitled cause; and given the notice of the taking of such appeal,

Now, the condition of the above obligation is such that if the said B. I. Salinger, Jr., shall be and appear before the said Supreme Court of the United States, at and during the present term thereof, and [fol. 237] from day to day thereafter, and shall be and appear before the said Court at the next regular or special term thereof, on the first day thereof, and from day to day thereof, and term to term thereafter until finally discharged therefrom, and to abide the order and judgment of the said United States Supreme Court, and not to depart the Court without leave, and shall further abide by and obey all orders made by the said Supreme Court of the United States in this cause, and shall surrender himself in execution of the judgment appealed from as said Court may direct if the judgment of said U. S. District Court, Eastern District of Louisiana, New Orleans Division, in this cause, shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

(Signed) B. I. Salinger, Jr., By St. Clair Adams, Attorney.

(Signed) Southern Surety Company, By J. H. Bodenheimer, Agent and Attorney in Fact. (Seal.)

Approved: (Signed) H. J. Carter, Clerk U. S. District Court.

IN UNITED STATES DISTRICT COURT

APPEAL BOND—Filed April 27th, 1923

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and Southern Surety Company, herein represented by J. H. [fol. 238] Bodenheimer, as surety, are held and firmly bound unto The United States of America, and Victor Loisel, as Marshal thereof for the Eastern District of Louisiana, in the full and just sum of One Hundred (\$100.00) Dollars to be paid to the said United States of America, and Victor Loisel, as Marshal thereof, for the Eastern District of Louisiana, certain attorney, executors, administrators or assigns to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of April, in the year of our Lord, one thousand nine hundred and twenty-three.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between B. I. Salinger, Jr., plaintiff, and the United States of America, and Victor Loisel, as Marshal thereof for the Eastern District of Louisiana, defendants, a judgment was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., having obtained an order of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, and Victor Loisel, as Marshal of the United States for the Eastern District of Louisiana, citing and admonishing them to be and appear before the United States Supreme Court to be holden at Washington, D. C., within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said B. I. Salinger, Jr., shall prosecute said appeal to effect, and answer [fol. 239] all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sgd.) B. I. Salinger, Jr. (Seal). By St. Clair Adams (Seal).

(Sgd.) Southern Surety Co. (Seal), By J. H. Bodenheimer (Seal), Agt. and Atty. in Fact. Sealed and delivered in presence of: ————.

Approved by (Sgd.) Rufus E. Foster, Judge.

[fol. 240]

IN UNITED STATES DISTRICT COURT

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
 Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his Deputies or any or either of them:

Whereas, Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner, for the purpose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota, in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

And whereas the Assistant United States Attorney for the Eastern District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me:

Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South [fol. 241] Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, this 26 day of April, 1923.

(Signed) Rufus E. Foster, Judge.

IN UNITED STATES DISTRICT COURT

FINAL MITTIMUS

UNITED STATES OF AMERICA,
 Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the Keeper of the House of Detention, in the City of New Orleans, Greeting:

Whereas, Ben J. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May, 1923,

in said District, in violation of Sec. 215 C. C. of the United States, unlawfully use the mail with a scheme to defraud.

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben J. Salinger, Jr., committed said offense as charged, I have directed that said Ben J. Salinger, Jr., be held to bail in the sum of \$15,000, to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 [fol. 242] day of April, 1923, and from time to time thereafter, to which the case may be continued and he having failed to give the required bail:

Now, these are therefore, in the name and by the authority aforesaid, do command you, the said Marshal, to commit the said Ben I. Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you the Keeper of said Jail of said City, to receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District, this 18 day of April, A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

[fol. 243] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

Extract from the Judgment Book

New Orleans, Saturday, April 28th, 1923.

This cause came on this day to be heard upon the application of the relator for a writ of habeas corpus;

Present: St. Clair Adams, Attorney for relator, and the relator, B. I. Salinger, Jr., in person; L. P. Bryant, Jr., Assistant United States Attorney, for Victor Loisel, U. S. Marshal, respondent;

Whereupon, after hearing the pleadings, evidence, testimony, and arguments of counsel and on due consideration thereof;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the application of the relator for a writ of habeas corpus be and the same is hereby denied, that the petition of the relator be dismissed with costs, and that the said relator, Ben I. Salinger, Jr., be remanded

[fol. 244] to the custody of Victor Loisel, United States Marshal, for this District, respondent herein.

Judgment rendered April 28th, 1923.

Judgment signed April 28th, 1923.

(Signed) Rufus E. Foster, Judge.

UNITED STATES DISTRICT CT., EASTERN DISTRICT OF LOUISIANA

[Title omitted]

PRÆCIPUE FOR TRANSCRIPT OF RECORD—Filed May 3, 1923

To the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

SIR: You will please incorporate in the transcript of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled and numbered cause, the following:

1. Petition for writ of Habeas Corpus.
2. The return of the United States Marshal to said petition.
- [fol. 245] 3. Certified copy of the indictment.
4. Certified copy of the motion or application for order of transfer of said indictment from the Southern Division of the District of South Dakota, to the Western Division of said District.
5. All of the documents, testimony and proceedings in the matter of B. I. Salinger, Jr., versus Victor Loisel, United States Marshal, No. 17233 of the docket of this Court, except the indictment, motion to transfer from the Southern Division to the Western Division of the District of South Dakota, return of the Government to the petition for writ of Habeas Corpus.
6. All of the documents, testimony and proceedings in the matter of B. I. Salinger, Jr., versus Victor Loisel, United States Marshal, No. 17238 of the docket of this Court, except the indictment, motion to transfer from the Southern Division to the Western Division of the District of South Dakota, return of the Government to the petition for writ of habeas corpus.
7. The warrant of removal.
8. Judgment.

Yours truly, (Signed) St. Clair Adams, Attorney for Appellant.

[fol. 246]

IN UNITED STATES DISTRICT COURT

LETTER OF ASST. U. S. ATTY. TO HAVE CERTAIN EXHIBITS INCLUDED
IN TRANSCRIPT—Filed May 18, 1923On Letter Head of United States Attorney, Eastern District of
Louisiana

New Orleans, La., May 18th, 1923.

Mr. H. J. Carter, Clerk U. S. District Court, New Orleans, La., East-
ern District of La.

No. 17,243, United States ex rel. B. I. Salinger, Jr., vs. Victor Loisel

DEAR SIR: It will be noted from the appellant's præcipe in the above entitled matter that the same calls for the inclusion of all of the documents, testimony and proceedings in the cases No. 17,233 and No. 17,238 of the Docket of the District Court.

Having examined the record, as heretofore made up and forwarded to the office of the Clerk of the United States Circuit Court of Appeals, I note that the following items contained in record No. 17,233 have been omitted:

1. Transcript of Record, United States Circuit Court of Appeals for the Second Circuit.

2. The bond given before the Clerk of the District Court of the United States for the Southern District of New York.

[fol. 247] 3. Certified copy of Order of United States District Court for the Southern District of New York.

4. Minutes of proceedings had in United States Court for the District of South Dakota on April 23rd, 1923.

In record No. 17,238, the item consisting of Bench Warrant issued under seal of the United States District Court for the District of South Dakota.

We should thank you to include the said items above mentioned in the transcript of record No. 17,243.

Respectfully, For the U. S. Atty. (Signed) L. P. Bryant, Jr.,
Asst. U. S. Atty.

CLERK'S OFFICE

CLERK'S CERTIFICATE

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, do hereby certify the following documents to be true and correct copies of the originals of record in this office:

Petition for Writ of Habeas Corpus and order.
 Answer and Return to petition for writ of Habeas Corpus.
 Exhibit—Indictment.
 Motion for Transfer to District of South Dakota.

[fol. 248] Documents in Case No. 17,233:

Petition for writ of Habeas Corpus.
 Report of Hearing April 20, 1923.
 Exhibit—Transcript of Record, U. S. Circuit Court, 2nd Circuit.
 Exhibit—Bond on Removal to the District of South Dakota.
 Exhibit—Copy of Order on Mandate of U. S. Circuit Court of Appeals, 2nd Circuit.
 Exhibit—Minute Entries of U. S. Dist. Court, District of South Dakota.
 Warrant of Removal.
 Judgment.
 Petition for Appeal and Order.
 Assignment of Errors.
 Bail Bond.
 Appeal Bond.

Documents in Case No. 17,238:

Petition for Writ of Habeas Corpus & Order.
 Report of Hearing April 20th, 1923.
 Exhibit—Bench Warrant.
 Warrant of Removal.
 Return of U. S. Commissioner.
 Judgment.
 Petition for Appeal and order.
 Assignment of Errors.
 Bail Bond.
 Appeal Bond.
 Warrant of Removal.
 Judgment.
 Præcipe for Appellant.
 [fol. 249] Letter of Asst. U. S. Atty. to have certain exhibits included in Transcript.
 Clerk's Certificate.
 Witness my hand and the seal of said Court at the City of New Orleans, La., this 21st day of May, A. D. 1923.
 H. J. Carter, Clerk. (Seal.)

[fol. 250] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

[Title omitted]

ARGUMENT AND SUBMISSION

Extract from the Minutes of December 3rd, 1923

On this day this cause was called, and, after argument by B. I. Salinger, Esq., for appellant, and Louis H. Burns, Esq., U. S. Attorney, for appellees, was submitted to the Court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER COMMITTING APPELLANT TO THE PARISH PRISON PENDING
DETERMINATION OF CASE

Extract from the Minutes of December 3rd, 1923

It is ordered that a commitment issue herein committing B. I. Salinger, Jr., appellant herein, to the Parish Prison of the Parish of Orleans, State of Louisiana, at New Orleans, La., pending the determination of the above entitled and numbered cause.

[fol. 251] UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

COMMITMENT—Issued December 3rd, 1923

To the Marshal of the Eastern District of Louisiana or either of his Deputies and the Keeper of either of the Gaols in said District, Greeting:

These are, in the name of the President of the United States of America, to command you, the said Marshal or Deputies, and each of you, forthwith to convey and deliver into the custody of the Keeper of the Parish Prison of the Parish of Orleans, State of Louisiana, the body of B. I. Salinger, Jr., as directed by the order this day entered in the proceedings entitled "B. I. Salinger, Jr., Appellant, versus The United States of America, and Victor Loisel, as U. S. Marshal, Eastern District of Louisiana, Appellees."

And you the said Keeper, in the name of the President of the United States of America, aforesaid, are hereby commanded to receive the said B. I. Salinger, Jr., into your custody in said Parish Prison, and him there safely to keep or be otherwise discharged in due course of law, until the further orders of the Court.

Hereof fail not at your peril.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 3rd day of December, in the year of our Lord one thousand nine hundred and twenty-three.

(Signed) Frank H. Mortimer, Clerk of the U. S. Circuit Court of Appeals, for the Fifth Circuit. (Seal.)

[fol. 252] MARSHAL'S RETURN—Filed December 5th, 1923

Received by U. S. Marshal, New Orleans, La., Dec. 3/23, and on the same day month and year I executed this writ by delivering the body and person of the within named B. I. Salinger, Jr., into the custody and keeping of the Warden of the Parish Prison in New Orleans, La., and within the four walls of said prison, as aforesaid by law.

Victor Loisel, U. S. Marshal, By (Signed) E. M. Kinler, Dy.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION OF APPELLANT TO BE RELIEVED FROM CUSTODY—Filed December 4th, 1923

Comes now the said appellant and petitions the court that he be on conditions relieved from being in custody pending final decision of his appeal in this Court, to which he was committed by said order of said date. In support he attaches as part of this application, his own affidavit.

B. I. Salinger, Jr., By (Signed) St. Clair Adams & B. I. Salinger.

CERTIFICATE

The undersigned, counsel for Petitioner, hereby certify that this application is made in good faith.

(Signed) St. Clair Adams, B. I. Salinger.

[fol. 253] STATE OF LOUISIANA,
Parish of Orleans:

AFFIDAVIT OF B. I. SALINGER, JR.

I, B. I. Salinger, Jr., being first duly sworn say on my oath:

His Honor, the Senior Judge of this Court made order that pending this appeal this affiant be enlarged on giving bail bond in \$5,000.00 conditioned that he would conform to and abide by the

orders of this Court; he gave such bond, and same, a surety company bond, subsisted and was in force when this Court made said order. While said bond was in force, affiant was in Chicago, Illinois, with the consent of the Court from which said appeal was taken. While in Chicago a complaint was lodged against him there, seeking his removal to the District of South Dakota on the same indictment involved in this appeal. The complaint made no mention of this appeal or those to the Supreme Court of the United States; nor said bond in this Court or in the Supreme Court.

The District Judge of whom removal was sought, compelled affiant to give bond in \$10,000, obliging affiant to abide the orders of said Judge; and he has postponed action from time to time awaiting whether the Government would move to dismiss affiant's appeals to the Supreme Court. The last postponement was made November 28th, 1923, and to December 10th, 1923. It was made though affiant protested that it was his duty to appeal in this Court on December 3d, 1923. He finally made application to be permitted to be before this Court on December 3d, 1923. The application was denied, and the Judge said it was absurd to claim that affiant was bound to then appear in the Court in person. Notwithstanding this, affiant did come and appear in person in this Court on December 3d, 1923. The order now sought to be modified was made, notwithstanding [fol. 254] standing, and thereunder he is now in prison to be there kept if said order remains unchanged until such time as his appeal may be decided.

He respectfully shows that he took this appeal in good faith—one object being that if relief was denied him in the District Court of Louisiana, to have the Supreme Court pass upon whether he ought to be removed; and that he sought no writ for the purpose of delay. He pledges himself under this oath to make no further application for a writ of habeas corpus in any place, neither by himself or by agent or through other counsel. He hereby consents that in addition to any other remedy or punishment that the Government or this Court may impose on violation of this pledge, that the application for such a writ, no matter where made, shall automatically operate as a forfeiture of the bonds given in this Court, and aggregating \$10,000.00; and shall ipso facto work a dismissal of his appeal in this court.

Whereupon he prays that upon said conditions he be relieved from the imprisonment he is suffering by reason of said order of December 3d, 1923.

(Signed) B. I. Salinger, Jr.

Sworn and subscribed to before me this 4th day of December, A. D. 1923. (Signed) Francis P. Burns, Notary Public.
(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER DENYING MOTION OF APPELLANT

Extract from the Minutes of December 4th, 1923

On consideration of the motion of the appellant that he be relieved from being in custody on conditions, pending the final decision of [fol. 255] his appeal in this Court herein:

It is ordered that said motion be, and the same is hereby denied.

[fol. 256] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

[Title omitted]

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION OF THE COURT—Filed December 11th, 1923

BRYAN, Circuit Judge: This is an appeal from an order of the district court for the Eastern District of Louisiana, dismissing a petition for a writ of habeas corpus and remanding the petitioner, B. I. Salinger, Jr., for removal for trial to the District of South Dakota.

May 20, 1922, the petitioner was indicted in the western division [fol. 257] of the District of South Dakota. The indictment is drawn under section 215 of the Criminal Code, and charges the petitioner, and others, with devising a scheme to defraud, and, for the purpose of executing such scheme, with placing certain letters in the United States mail at Sioux City, Iowa, and causing the same to be delivered within the southern division of the District of South Dakota.

June 13, 1922, the petitioner gave bond in Iowa for his appearance for trial, but did not appear. A bench warrant was thereupon issued against him, and he was arrested in New York, where he brought habeas corpus proceedings in the Federal district court. The District Judge dismissed the petition and ordered the petitioner removed to South Dakota for trial. This order was affirmed on appeal to the Circuit Court of Appeals for the Second Circuit. *Ex parte Salinger*, 288 Fed. 752; and thereupon, on March 20, 1923, the petitioner again gave bond for his appearance on April 3, 1923, for trial in South Dakota.

March 31, 1923, the petitioner was surrendered by the surety on his bond last mentioned to the marshal in New Orleans, and immediately filed his petition for a writ of habeas corpus before the

District Judge for the Eastern District of Louisiana and secured his release from custody by giving bond for his appearance at the final hearing on the petition. April 18, a second petition was filed, which included a prayer for a writ of certiorari. April 26, upon final hearing, the said District Judge dismissed these two petitions and signed two warrants of removal, but April 27, he approved superseas bonds and allowed appeals to the Supreme Court.

In the meantime, the District Judge for the District of South Dakota had forfeited petitioner's bond of March 20, 1923, given in New [fol. 258] York, and issued another bench warrant; and removal proceedings under R. S. section 1014 had been taken and completed before a commissioner in New Orleans. Based on these later proceedings, the court below, on April 26, signed a third warrant of removal, and refused to sign an order allowing an appeal. April 27, petitioner applied for a third writ of habeas corpus, but the next day the Court entered an order dismissing his petition; and this last order is brought here for review. The appeal, to operate as a superseas upon bond being given, was allowed by a member of this court. The bond was given, and the petitioner has not been removed.

The surety who furnished bond in New York and surrendered the petitioner to the marshal in New Orleans is also the surety on the appeal bonds in the Supreme Court and in this Court.

It is suggested that the District Court erred in issuing its third warrant of removal on the ground that the Supreme Court will be deprived of its jurisdiction on the appeals taken to it, in the event the petitioner is removed before those appeals are reached for decision. Three warrants for removal were granted the day before the appeals to the Supreme Court were allowed. Only two of these warrants were affected by those appeals. The third warrant remained unaffected, and there was nothing to prevent petitioner's removal except the subsequent allowance of an appeal by a member of this Court. Our concern is therefore solely with the case on appeal here, in which the warrant of removal is based on a bench warrant due to the forfeiture of the bond given by the petitioner in the Southern District of New York for his appearance in the District of South Dakota.

The petitioner seeks to prevent his removal for trial on the ground that the District Court in South Dakota is without jurisdiction, because (a) the indictment was found in one division for an offense alleged to have been committed in another, and (b) the indictment does not charge that the letters were mailed within the jurisdiction of the trial court. These same contentions were made in New York, in both the District Court and in the Circuit Court of Appeals. It appears that the Circuit Court of Appeals for the Eighth Circuit, in which South Dakota is, has ruled against the first contention in *Biggerstaff v. United States*, 260 Fed. 926, and against the second in *Moffatt v. United States*, 232 Fed. 522. The Circuit Court of Appeals for the second Circuit in *Ex parte Salinger*, supra, indicated that it agreed with these rulings.

We do not think it would be seemly or proper for this Court also to pass upon these same contentions. In its final analysis, this is but an attempt to substitute a writ of habeas corpus for a writ of error.

It is also, as it seems to us, a palpable abuse of the writ of habeas corpus. When the first bond was given in Iowa, which is in the Eighth Circuit, the petitioner made bond to appear for trial; and in New York, after he had unsuccessfully attempted to prevent his removal, he voluntarily gave bond for his appearance for trial, and instead of complying with his bond, he again thwarted a trial by applying for further writs of habeas corpus outside of the jurisdiction of the trial court. The fact that the same surety which surrendered the petitioner in Louisiana, instead of delivering him up for trial in South Dakota, again bound itself by new bonds is sufficient of itself to show that the resort to the court below was not really for the purpose of enabling the petitioner to secure his liberty, but was designed to obtain, if possible, a ruling upon the validity of the indictment by the court below different from the rulings made in the Second Circuit, where the former application for habeas corpus was made, and [fol. 260] in the Eighth Circuit, in which the trial is sought to be held. The case presented to us is therefore similar to the case of *Stallings v. Splain*, 253 U. S. 339. See also *In re Chapman*, 156 U. S. 211; *Riggins v. United States*, 199 U. S. 547; *Johnson v. Hoy*, 227 U. S. 245, and in *Ex parte Ford*, reported in 35 L. R. A., (N. S.) 882.

The conclusion is that the order dismissing the writ of habeas corpus, and remanding the petitioner for removal to the District of South Dakota should be, and it is

Affirmed.

(Original filed December 11th, 1923.)

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

JUDGMENT

Extract from the Minutes of December 11th, 1923

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed.

[fol. 261] UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 250 to 260 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4088, wherein B. I. Salinger, Jr., is appellant, and The United States of America, and Victor Loisel, as U. S. Marshal, Eastern District of Louisiana, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 249 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 13th day of December, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. [Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

[fol. 262] WRIT OF CERTIORARI AND RETURN

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which B. I. Salinger, Jr., is appellant, and The United States of America and Victor Loisel, as United States Marshal, Eastern District of Louisiana, are appellees, No. 4088, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause; so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the tenth day of December, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 264] [File endorsement omitted.]

[fol. 265] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 4088

B. I. SALINGER, JR., Appellant,

versus

THE UNITED STATES OF AMERICA and VICTOR LOISEL as U. S.
MARSHAL EASTERN DISTRICT OF LOUISIANA, Appellees

Clerk's Office

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit do hereby certify that the attached transcript, of 261 pages, contains full, true and complete copies of the pleadings, proceedings and record entries, including the opinion of said United States Circuit Court of Appeals, in a certain cause wherein B. I. Salinger, Jr., was appellant, and The United States of America, and Victor Loisel, as United States Marshal for the Eastern District of Louisiana, were appellees, No. 4088, of the docket of said Circuit Court of Appeals, as full, true and complete as the same remain on file and of record in my office.

In pursuance of the command of the foregoing Writ of Certiorari, said transcript is transmitted to the Supreme Court of the United States.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Fifth Circuit, at the city of New Orleans, State of Louisiana, this 13th day of December, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth District.)

[fol. 266] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1923

No. 705

[Title omitted]

STIPULATION FOR OMISSION OF INDICTMENT

It is hereby stipulated that in printing the transcript of record herein the indictment need not be printed it being the same indictment as is printed in the records in Nos. 341 and 342.

James M. Beck, Solicitor General. B. I. Salinger, Counsel
for Petitioner.

76W My 36

Carroll, Iowa, 109 p. Dec. 28, 1923.

Clerk of the U. S. Supreme Court, Washn. D. C.:

Have today mailed you check for Four Hundred Dollars as per yours of the Twenty Seventh stop obtain direction from Beck that indictment is to be omitted and you may sign my name to that direction.

B. I. Salinger.
254 p.

Endorsed on cover: File No. 30,015. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 705. B. I. Salinger, Jr., petitioner, vs. The United States of America and Victor Loisel, as United States Marshal, Eastern District of Louisiana. (Writ of certiorari and return.) Filed December 19th, 1923. File No. 30,015.

(1522)

JAN 9 19

WM. R. STANS

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 705

B. I. SALINGER, JR., APPELLANT,

vs.

VICTOR LOISEL, UNITED STATES MARSHAL FOR
THE EASTERN DISTRICT OF LOUISIANA, *et al.*,

CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR APPELLANT.

B. I. SALLINGER,

Attorney for Appellant.

ST. CLAIR ADAMS,

L. H. SALINGER,

On Brief.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

B. I. SALINGER, JR., APPELLANT,

vs.

VICTOR LOISEL, UNITED STATES MARSHAL FOR
THE EASTERN DISTRICT OF LOUISIANA,
et al.

CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA.

STATUS.

This is *certiorari* to the Circuit Court of Appeals in the Fifth Circuit. There is presented in it every point raised on the argument in No. 341 and No. 342. The additional matters discussed in it are:

1. Did said Court of Appeals have jurisdiction?
2. Was the decision of the New York courts an adjudication against appellant?
3. Does any waiver or estoppel bar defendant to resist removal on the ground that he has executed appearance bonds?

STATEMENT OF CASE PECULIAR TO 705.

The District Court had before it whether appellant ought to be removed to the District of South Dakota, upon the indictment returned in that district and upon such further evidence as was adduced before that court. It held there might be removal and accordingly dismissed the two writs of habeas corpus. It allowed appeals to this court and ordered that the appeals should operate as a supersedeas pending decision in this court, and it required certain bonds including one "in the nature of a supersedeas appeal bond,"—and these were given as ordered.

The Circuit Court of Appeals allowed appeal and assumed jurisdiction:

(1) To decide whether the District Court erred in ordering removal after said appeals to this court had been perfected.

(2) It took jurisdiction to decide the very questions which the perfecting of said appeals had transferred to this court.

It did not have power to pass on the question whether the District Court erred in ordering removal after the perfecting of said appeals; this, because interference with the supersedeas was also a question for this court alone.

All further statement necessary is in the argument in No. 341 and No. 342.

ADDITIONAL SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals of the Fifth Circuit had no jurisdiction of the subject matter because that subject matter was at the time, when said Court of Appeals assumed jurisdiction, in the Supreme Court of the United States, and no other court could deal with it, while it was thus pending in the Supreme Court.

II.

The Circuit Court of Appeals erred in holding, if it did so hold, that the decision of the New York courts was an adjudication against this appellant.

III.

It erred in holding (if it did so hold) that any waiver or estoppel was a bar to resisting removal on the part of this appellant.

Division I.

THE CIRCUIT COURT OF APPEALS FOR THE CIRCUIT HAD NO POWER TO DO ANYTHING BECAUSE IT HAD NO JURISDICTION OF THE SUBJECT MATTER.

As above shown, said Court of Appeals assumed jurisdiction when the Supreme Court of the United States had already assumed and still had it. We submit that all said Circuit Court of Appeals could effectually do was to dismiss the appeal. It needs no brief for the proposition that federal courts must, if it be not done by the litigant, raise the question of their own jurisdiction *sua sponte*.

The text in 15 Corpus Juris, pp. 1134-1136, declares:

"Where two actions between the same parties on the same subject and to test the same rights are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete jurisdiction, retains its jurisdiction and may dispose of the whole controversy and no court of coordinate power is at liberty to interfere with its action. This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by the courts and is a necessary one, because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results."

Again, at page 1138:

"With respect to appeals it has been held that where an appeal may be taken to different courts and several parties are each entitled to appeal, the one first perfecting an appeal to one of such courts thereby carries the entire case to that court. But it has also been held that where concurrent appeals are taken to the court of last resort and to a lower appellate court the latter will dismiss its appeal to it when the former takes jurisdiction. It is also necessary that the court first obtaining jurisdiction should be in a position to determine the whole controversy and to settle all the rights of the parties, and if by reason of the limited jurisdiction or mode of proceedings of that court these results cannot be accomplished, another court may take jurisdiction."

In Taintor's case, 16 Wall. 367, it is said:

"When a state court and a court of the United States may each take jurisdiction, (as in this case), the tribunal which first gets it, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that, when jurisdiction has attached to a person or thing, it is—unless there some provision to the contrary—exclusive in effect until it has wrought its function."

Illustrative of the basic foundation of this point is the

Peckham case, 125 Fed. at 990, cited in the Stallings case. The Peckham case declares:

"If it was the duty of the marshal to arrest him under the second warrant it would be his duty to carry out the decision on the second warrant as it is his duty to carry out the decision on the first warrant. If the two proceedings resulted in an order for the removal of the defendant in the one case to the eastern district for trial, and in the other case to the District of Columbia for trial, it is obvious that no such orders could be complied with at the same time. The only possible ruling is that a court which has in custody a person charged with a crime, has exclusive custody and jurisdiction until the question of his guilt or innocence is determined, and if he is found guilty, until the period of imprisonment has expired."

In the case of James, 18 Fed. 857, there is quoted with approval the following statement of Judge Dillon made in *U. S. v. Van Fossen*, 1st Dill. 411:

"If a person is in the actual custody of the United States for the violation of its laws, no state can, by habeas corpus or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody, under the process or authority of a state, is by express enactment beyond the reach of the federal courts or judges (citing the judiciary act)."

We submit that both upon reason and authority all power possessed by the Circuit Court of Appeals was to order the dismissal of the appeal to it.

Division II.

The Circuit Court of Appeals erred in sustaining the District Court in proceeding to execute order of removal while appeal testing the right to remove was pending on appeal to the Supreme Court—if it be assumed the Circuit Court of Appeals had jurisdiction.

This appellant resisted removal from Louisiana to South Dakota, mainly on the ground that the indictment upon which removal was sought was void for stated reasons. His contention having been overruled by the United States District Court for the Eastern District of Louisiana, he perfected appeal to the Supreme Court of the United States. With this he gave bonds as directed; and this made effective the order which allowed said appeal to the Supreme Court to operate as a *supersedeas*. And he should have been thereupon enlarged under said bonds.

It appears that despite said pendency of said appeals, and the existence of said *supersedeas*, a warrant of removal issued by the judge of said District Court was by him ordered to be executed, and bail denied. The Circuit Court of Appeals allowed appeal, superseded, and allowed bail. But it sustains the District Court in attempting to execute the removal despite pendency of appeal in this court. If that be not error, the appeal to this court was idle. How can it effectively pass on whether there ought to be a removal, if one be executed before it reaches decision of the appeal. To what end the order of *supersedeas* and the *supersedeas* bail bond. When attempt to remove was made this court had whether appellant ought to be removed. While appeal was pending in the Supreme Court, and during the subsistence of

said *supersedeas*, the District Court had no power or jurisdiction to order appellant in custody—or to remove him, because the effect of the *supersedeas* was to permit him to be free from custody, and that he should not be removed, pending decision of his appeal to the Supreme Court.

It would seem to be self-evident that this position is sound. The basis of it is that when a question is pending in an Appellate Court no one may disturb the *status*, and thus bring about that the decision of the Appellate Court will be purely moot. The question in Washington was and is whether a removal was permitted where the basis of it was a certain indictment. The effect of the *supersedeas* was that the appellant should not be in custody nor be removed pending decision of this question by the Supreme Court of the United States. If a United States District Court can while this appeal is pending, and while that *supersedeas* remains effective, order a removal or a detention pending decision of the appeal in the Supreme Court, then though by the *supersedeas* of the Supreme Court the appellant is enlarged, the District Court can order him into custody or give him the alternative of being at once removed. If this is permitted the jurisdiction of the Supreme Court depends on the sufferance of the lower court. That court can accomplish that when this court enters upon whether there should be a removal, that question has become moot.

Again—look at it from the standpoint of appellant. He asks the Supreme Court to decide whether he ought to be removed at all on the strength of a certain indictment. He gives bond that he will abide the judgment of the Supreme Court. He takes the steps that entitle him on an order of that court to remain at large pending de-

cision. If while that remains the situation a District Court can order him into custody or remove him, the same order may be made by any number of District Courts if by chance the appellant be found at different times in different districts. He can be overborn by the number of new bonds that might be demanded although he has already given the bonds that obtained *supersedeas* in the Supreme Court of the United States. He may be ordered into custody any number of times although the *supersedeas* says that he may remain at large. And finally, after being put to the burden of perfecting and possibly making argument on his appeal in Washington, be removed and have nothing remaining but the poor satisfaction that if the Supreme Court should decide his case at all, it might find he ought not to have been removed.

Division III.

It is the settled law that successive applications for writ of habeas corpus may be made, and that so long as there is a remand successive applications cannot be met by the claim that the decision on a former application is an adjudication against applying again.

The opinion declares that the contentions now made were unsuccessfully made in New York, in both the District Court of the United States and in the Circuit Court of Appeals, for the Second Circuit, and it says: "We do not think it would be seemly or proper for this court also to pass upon the same contentions,"—and that what is now being done, "is but an attempt to substitute the writ of habeas corpus for a writ of error." It may be that this is not a holding that the said proceedings in New York work an adjudication. At any rate, it is all

that is said upon which the respondent could assert adjudication.

First of all, let it be said that while the record does set forth the proceedings that were had in New York (342, pp. 46, 47, 49-60, 65-75) there is not one word that even intimates that a plea of former adjudication is being interposed. (342, pp. 6-9, 63, 64) It is, of course, elementary that adjudication is not for decision unless specially pleaded. That this is the general rule will not be denied. *Williams*, 265 Ill. 64; *Hutson* (Ill.) 123 N. E. 526; *Mayhood*, 4 Alaska, 226; *Salen*, 244 Federal, 299; *Graff*, 226 Federal, 798; Daniel, Chancery Pleading & Practice (6th Am. Ed.) *855; *Pioneer Company*, 110 N. C. 176.

It should be pleaded specially. *Maybury* (C. C. A.) 60 Federal, 645; Bigelow, Estoppel (5th Ed.) 455; *Wood*, 29 Ind. 179; *Robbins*, 76 Ind. 390; *Cole*, 84 Ind. 448; *Stewart*, 90 Ind. 458; *Thomas* (La.) 35 Southern 811; *Hinton* (La.) 50 Southern, 798; *In re Youtsey*, 260 Federal, 423. It is said in *Railway v. Howard*, 13 How. 335, 336, that the rules on this subject are well settled, to wit, the rules that require estoppels to be specifically pleaded and thus pleaded "with great particularity and precision, leaving nothing to intendment." Bliss, Code Pleading, 3rd Ed. 364, declares that such plea must be affirmative and specific. To like effect is *Mayhood*, 4 Alaska, at 229, 230; *Hinton* (La.) 50 Southern, 799; *Coffinger*, 210 Norton, 2 I. R. 241; *Onward*, 20 Smithson. The grounds of estoppel relied on must be set forth and pleaded as an estoppel. *Bounecaze* (La.), 26 Southern, 833; *Hilton* (Ky.), 78 S. W. 890.

There must be special plea and it must set forth facts which indicate that an estoppel is being urged. *Smith* (S. D.), 126 N. W. at 594.

Where defendant does not plead estoppel either in the

original answer or amendment thereto as a defense to the action, he cannot avail himself thereof, though the evidence establishes this defense. *McQueen* (S. D.), 107 N. W. 208.

The court will not notice grounds of estoppel not especially pleaded. *Adkins* (La.), 55 So. 746.

This was held in a case which was reversed because recovery below was based on estoppel and though the evidence to prove an estoppel was not objected to by plaintiff.

This rule has been applied to *habeas corpus* proceedings. For, in the case of *Hill* (Colo.) 190 Pac. 425, it is said that those who seek to rely upon *res judicata* should have framed an issue on the matter of *res judicata*, in the proper way, and that merely directing the attention of the court to the *habeas corpus* proceeding is insufficient.

Indeed, the rule requiring pleading and the reasoning that underlies it settle that it is not enough to set out matters upon which an estoppel *might* be based, but that it must be made to appear the facts set out are relied upon as working an estoppel. This is so because such an estoppel is drastic, in that, "it gives the right to shut out the truth." Wherefore, it should appear affirmatively. *Bliss*, Code Pleading (3rd Ed.) 364; *Mayhood*, 4 Alaska at 229, 230. And to work an estoppel, declares *Daniel*, Chancery Pleading (8th Ed.) 34, it will not suffice where, say, fraud is relied on as constituting an estoppel, to pick out from the allegations in the pleadings facts which might, if put forward as proof of fraud, have warranted plaintiff in asking and the court in granting the relief involved—estoppel. Special defenses can be waived. *Mack*, 60 Fed. 753.

In the case of *Koppel*, 148 Federal, 505, the court calls attention to the fact that *res judicata* was raised in the

return (506), and then holds that the plea is not tenable. The statutes of the United States contemplate that there shall be pleadings in *habeas corpus* proceedings. (Sections, 754, 757, 760, R. S.) In *Ex Parte Stevenson* (Okla.) 94 Pac. 107, another *habeas corpus* case, it is stressed that, "in the record before us it would seem that the question of former adjudication was not raised (below) but that the case was there presented upon the evidence."

In the case of *Salen*, 244 Fed. at 299, the facts upon which an adjudication could be claimed were fully in the record, but the court said:

"I should dismiss the complaint on the defendant's motion if *res adjudicata* was pleaded as a defense, but since it is not pleaded and since the action is one at law, I am constrained to say that I am without power to dismiss."

In the case of *Scott* (Conn.) 35 Atl. 262, a *habeas corpus* proceeding, it is said: that "when pleadings are allowed the rules which govern pleadings, so far as they are applicable must be observed. This rule has been applied in the case of *Cox*, 15 App. Cas. at 516. No evidence which is not covered by proper plea may be considered in a *habeas corpus* proceeding. (*Ex Parte Avakian*, 188 Federal, at 689, Point 4.) And see the case of *Backus* (C. C. A.) 223 Federal, 487.

Passing all this, there is no adjudication because even if we waived that the parties are not identical it remains the fact that the issues are not. In the New York courts the conclusion of the indictment that the offense was committed in South Dakota was not met by any testimony. In the District Court of Louisiana those conclusions were met by the testimony of each of the three defendants that at no material time were they in the district of South Dakota. (342-42, 43) Their testimony was not impeached; and nothing disputed it, except the

said conclusion in the indictment. And as shown elsewhere such testimony overcomes such conclusion, as matter of law.

The general rule is that there is an adjudication "unless it is alleged and shown by complainant that the issues are not the same."

Sanitary Co. 226 Fed. at 797.

It is said in the *Clarke* case (Mo.) 106 S. W. at 996, 997, that

"From these cases may be deduced the doctrine that the principle of *res adjudicata* does not apply in cases of *habeas corpus* to judgments remanding the prisoner or to judgments discharging the prisoner where a new state of facts warranting his restraint is shown to exist different from that which existed at the time the first judgment was rendered."

Part 3-1.

A REMAND IN HABEAS CORPUS IS NOT AN ADJUDICATION, BECAUSE IT IS NOT MORE THAN THE ACTION OF A COMMITTING MAGISTRATE.

"And indeed all cases of commitment on a criminal charge the duty of the court or judge thereof upon such hearing is similar to that of the magistrate upon a preliminary examination; and though the prisoner may be discharged he may again be arrested for the offense upon a sufficient showing.

While the decision of the court or judge may liberate the prisoner from imprisonment it does not determine his innocence. He may be charged, tried and convicted without regard to his discharge upon the writ of *habeas corpus*. Upon such a hearing the guilt of the prisoner of the crime charged or of the right to rearrest him in consequence of it, cannot be finally determined. The order of his discharge simply releases him from the particular restraint to which he is subjected. Such a decision cannot convict him or acquit him of the crime charged." *Clarke* (Mo.), 106 S. W. at 996.

Ex Parte Johnson (Okla.) 98 Pac. at 465.

"If anything is wanting to remove all doubt, it will be found in the nature and object of this great writ as a constitutional right; its purpose being to afford a speedy remedy to a party unjustly accused of the commission of a crime without obstructing or delaying public justice, both of which objects would be defeated by the delays consequent upon an appeal. Any other rule would operate practically to subvert the constitutional safeguards and the fundamental rights of the citizens."

In *Howe v. State*, 9 Mo. 690, the reason assigned is that "The refusal to grant or discharge is not a final judgment."

In *Ex Parte Johnson* (Okla.) 98 Pac. at 464, the court approves the holding in the case of *Snyder*, 17 Kans. 552, construing an identical statutory provision, and holding that the statute did not apply because an order of commitment to hold a prisoner for trial issued by a magistrate before whom the person is brought for examination upon a charge of having committed an offense, and the finding that it appears the prisoner is guilty as charged in the complaint, is not "a process issued on any final judgment of a court of competent jurisdiction."

The most that can be made of a removal proceeding under Section 1014 is that it involves the functions of a committing magistrate. It is said in the *Pratt* case, 279 Fed. at 265, that the single question is whether there is an entire absence of evidence to show probable cause. For this it cites the *Henry* case, 8th Supreme Court, 123 U. S. 373. To settle such a question is, of course, nothing but the function of a committing magistrate.

No matter what court finally affirms, it is still dealing with nothing but the action of a committing magistrate—it needs no brief for the proposition that such action is never an adjudication, and this is why it is universally held that the points unsuccessfully urged against removal may be renewed in the trial court. In this connec-

tion it is not amiss to point out that an order of removal is reviewable on *habeas corpus*—a collateral attack. Can one conceive that there may be collateral attack upon what is in truth an adjudication.

Part 3-2.

PASSING THAT—THERE IS NO ADJUDICATION BECAUSE REMOVAL PROCEEDINGS DO NOT CONSTITUTE EITHER A CASE AT LAW OR A SUIT IN EQUITY.

They differ vitally from such a case or such a suit, because, for one thing, in the removal proceedings, a pleading drawn by the moving party, is admitted as evidence in his behalf. They differ still more radically from such a case or such a suit because in nearly every case where a *habeas corpus* application has resulted in a remand it was stated (and that is so of the opinion by the Circuit Court of Appeals in the 5th circuit) that the points made in resistance to removal were not foreclosed by an order of removal, and that the same points were available to the accused when he reached the trial court. It is difficult to understand how there can be an adjudication as to any point presented where it is the settled law that notwithstanding decision upon it, the same point may again be presented elsewhere. The one outstanding attribute of adjudication is that whatsoever it settles is settled for all places, for all courts and for all time.

Lord Halsbury, in *Cox v. Hakes*, 15 A. P. P. C. A. S. at 514, 515:

“It was not a proceeding in a suit but was a summary application by the person detained.”

Cox v. Hakes, 15 A. P. P. C. A. S. at 514, 515.

In finding probable cause “his decision does not determine the question of guilt any more than his view

that the indictment is enough for the purpose of removal definitely determines its validity." *Tinsley's case*, 205 U. S. 20; 27 Sup. Ct. 433.

It is not final. *Blaffer* (C. C. A.), 160 Fed. 389.

Part 3-3.

IN VIEW OF THE FOREGOING IT IS NOT ASTONISHING THAT THE CASE LAW HOLDS WITHOUT BREAK THAT A REMAND IN HABEAS CORPUS NEVER WORKS AN ADJUDICATION.

In *Ex Parte Kaine*, 3 Blatchford C. C. page 3, Mr. Justice Nelson said:

"The learned counsel, appearing on behalf of the British authorities, has objected that the decision of Judge Betts, sitting in the Circuit Court, upon the return to the writ of *habeas corpus* before that court, it being a court of competent jurisdiction to hear and determine the question whether the commitment under the Commissioner's order or warrant was legal or not, is conclusive, and a bar to any subsequent inquiry into the same matters by virtue of this writ. I do not so understand the law. The learned counsel has referred to *Mercein v. The People* (25 Wend. 64), as an authority. The question in that case arose under the statute of the State of New York regulating the proceedings upon the writ of *habeas corpus*; and, if a decision there is as supposed, it would not be an authority to govern the case. * * * But, the conclusive answer to this objection is that the proceedings upon this writ in the Federal Courts are not governed by the laws and regulations of the states on the subject, but by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe (*Ex parte Watkins*, 3 Peters, 193; *Ex parte Randolph*, 2 Brock C. C. R. 447); that, according to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one court or magistrate, upon the return to the writ, refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs, by any other court or magistrate having jurisdiction of the case; and that such court or magistrate may remand or discharge the prisoner in the exercise of an independent judgment upon

the matters (*Ex Parte Partington*, 13 M. & W. 679; *Canadian Prisoner's case*, 5 Idem 32, 47; *Suddis*, 1st East 306, 314; *Burdett*, 14 Idem 91; *Watson*, 9 Ad. and El. 731) in one of the cases referred to the prisoner had obtained this writ from two of the highest common law courts of England and also from the Chief Justice of the King's Bench at Chambers in succession and their judgments had been given upon a consideration of his imprisonment and the learned judge in delivering his opinion on the last application alluding to the decisions on the former writs, refusing to discharge, observed that this was no objection to the hearing on that occasion, as a subject in confinement had a right to call upon every court or magistrate in the kingdom, having jurisdiction of the matter, to inquire into the case of his being restrained of his liberty. The decision, therefore, of the Circuit Court, upon a previous writ of habeas corpus obtained on behalf of the prisoner, refusing to discharge him, will not relieve me from inquiry into the legality of the imprisonment under the order of the Commissioner, upon the present application."

In the *Partington* case, 13 M. & W. at 682, 683, it was said:

"The defendant, however, has a right to the opinion of every court as to the propriety of his imprisonment."

In Hilary Term, 8 Vict. 18, Messon and Wellsby's Report, 683, it is said:

"This case has already been before the Court of the Queen's bench on the return of a *habeas corpus* and before my Lord Chief Baron at Chambers on a similar application for a similar writ. In both instances the discharge was refused.

The defendant, however, has a right to the opinion of every court as to the impropriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute without considering ourselves as concluded by these decisions."

To like effect is *In re Bovack*, 2 B. C. at 223, 224.

In the matter of *Quinn*, 37 N. Y. S. 534, it was said (Cullen):

"In fact it is settled law that with the exceptions of a

narrow class of cases, such as the custody of infants, a decision on *habeas corpus* does not create an estoppel even upon the renewals of the writ."

Thaw v. Lamb, 118 N. Y. S. at 393.

Brinkley v. Brinkley, 56 N. Y. at 192.

The case is not within the principle of *Mercein v. People*, 25 Wend. 64, where the controversy related to the right to the custody of an infant child. In this case the relator is restrained of his liberty and a decision under one writ refusing to discharge him did not bar the issuing of a second writ by another court or officer.—Citing

Ex parte Kaine, 3 Blatchf.

Ex parte Partington, 13 M. & W. 679.

The King v. Suddis, 1 East, 806.

The previous so-called adjudication in proceedings in *habeas corpus* will not meet a new writ issued on the application of the relator.

People v. Brady, 56 N. Y. 192.

Denial of a prior writ of *habeas corpus* sought to enlarge a person acquitted of murder because of insanity on the ground that he was sane when the act was committed, was not *res adjudicata* because of the petitioner's plea of insanity on the subsequent hearing of a new writ for similar relief.

Thaw v. Lamb, 118 N. Y. S. at 390.

At common law, as has been seen, an order in *habeas corpus* proceedings remanding the prisoner to custody is not *res adjudicata*. The first adjudication at common law is not a bar to another inquiry upon the same state of facts. It is well settled that in the absence of restrictive statute a prisoner is entitled to exhaust the entire judicial authority of the state and federal courts having authority to act, in his efforts to free himself from unlawful imprisonment.—Citing *Carruth v. Taylor* (North Dakota), 77 N. W. at 620; *Church Habeas Corpus*, pp. 518, 519.

In re Snell, 31 Minn. 110, 16 N. W. 692, a well considered case, holds:

Under these authorities and the constitution of this

state, a person has the unassailable right, except when restricted by some statute, to apply to all courts for the liberty writ, which under the constitution has jurisdiction in *habeas corpus* cases.

Carruth v. Taylor (North Dakota), 77 N. W. at 620.

In the *Graves* case there is repeated the statement of Judge Nelson in *Ex parte Kaine* as to the proposition that the federal courts are not governed by state law, but follow the common law of England as it stood at the adoption of the Constitution.

In re Graves, 270 Fed. at 182-183.

"The doctrine of *res adjudicata* was not held appropriate to a decision of one court or justice therein; the entire judicial power of the country could thus be exhausted. (*Ex parte Kaine*) and cases there cited. The doctrine formerly prevailed in the several states of the Union, and in the absence of statutory provision, is the doctrine applicable now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject."

Ex parte Cuddy, 40 Fed. 62, 63—per Justice Field.

In *Ex parte Clarke* (Mo.), 106 S. W. at 996, this is quoted approvingly from *Weir's case*, 99 Mo. 488, to wit:

"That the doctrine of *res adjudicata* is not applicable to the case of a refusal to discharge, and that the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment, is conceded and is not limited in this state by statutory enactment, except in the one particular that the applicant for the writ in his petition must state 'that no application has been made or refused by any court, officer or officer superior to the one to whom the petition is presented.'

Subject to this limitation one restrained of his liberty may in succession apply to every court or officer authorized to issue the writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint."

The refusal of that court to grant the writ of habeas corpus is no bar to an application here, even if the writ has been granted, and the case fully heard upon the return made to it, and a formal order made of record refusing a discharge from imprisonment, yet the writ now applied for might be granted by this court. Proceedings refusing the benefit of a habeas corpus will always be considered with deference and respect when application is made to another tribunal but they are not final. They do not stand as judgments and do not bar any more than the refusal of a supersedeas or an order for an injunction out of court.

Ex Parte Alexander, 2 American Law Register, at 46.

In the case of *Ammon*, 100 N. Y. S. 256, it was said:

"We shall assume without discussion that *habeas corpus* is the correct proceeding and that the relator has a right to bring as many such proceedings as he may be advised are necessary to protect his legal rights—he having brought several other prior like proceedings."

"Upon the general question involved in this proposition there is some difference of opinion among courts and text writers. But research and reflection have brought us to the conclusion that the sound rule and that supported by a great weight of long-standing authority is that the decision upon *habeas corpus* of one court or officer refusing to discharge, is not a bar to the issue of another writ upon the same state of facts as the first by another court or officer and to a hearing or discharge thereupon.—Citing *People v. Brady*, 56 N. Y. 192; *Ex parte Kaine*, supported by the pronouncement of Lord Kenyon at 1st East, 314; *Ex parte Partington*; *In re Snell* (Minn.), Sept. 19, 1883, 16 N. W. at 693.

In re Gaylor v. Blair, 4 Wis. at 532:

If a court or officer illegally imprisons a person and afterward upon application for his release refuses the application, the matters involved can no more be said to be *res adjudicata* than if no application for his release

had been made. In either case the person is imprisoned by order of the court or officer, and any number of adjudications by such court or officer as to the legality of the imprisonment cannot change its character nor affect the rights of the relator.

Ex parte Clarke (Mo.), 106 S. W. at 995, 996.

Plea of estoppel by record in a *habeas corpus* case is good on the same facts where the prisoner has been discharged and is bad where the prisoner has been remanded as here."

It is true that in *habeas corpus* proceedings the doctrine of *res adjudicata* at common law does not apply in so far as a refusal to discharge on one writ is no bar to the issuance of a new writ.—Citing *Parkington*; *Cox v. Hakes*, 15 Appeal Cases, 506.

Bradley v. Beetle, 153 Mass.

But it is equally true that discharge of a prisoner stands on a different footing.—Citing 21 Cyc. p. 349; *McCombgar case*, 167 Mass. 154; *Turgeon v. Bean* (Me.), 83 Atlantic, at 559. (Idem.)

"No mere legal fictions used in matters of less moment or matters of punctilio or comity between courts may shield anyone restraining an American citizen of his liberty from having the why and wherefore of that restraint summarily looked into by any court of competent jurisdiction in the land.

The discretion of one judge of remanding the prisoner does not bar the discretion of another in discharging the prisoner on *habeas corpus*. * * * He comes into court with his shackles dropped; and the cause of his imprisonment—the very marrow of it—is laid bare to the utmost verge and minutia permitted by written law. And this, too, no matter what court has theretofore denied relief, unless it be a court of superior jurisdiction."

Clarke (Mo.), 106 S. W. at 996.

"And while a judgment remanding the party on a writ of *habeas corpus* is not subject to review on writ of error or appeal, it is entitled to some consideration on a second application and may warrant the refusal of the second

application. In the case at bar and in all cases where the petitioner on application to a District Court or judge thereof, has been remanded, we are of the opinion that the constitutional right of the party to the writ was not exhausted by the first remanding order and petitioner has the right to present his application to this court as has been done in this case.

We believe any other construction of the statute would render it unconstitutional as unduly infringing upon the powers given to the courts to issue writs of *habeas corpus*."

Ex parte Johnson (Okla.), 98 Pac. at 465, 466.

In the case of *Lawrence*, 56 N. Y. at 191, 192, there had been two prior writs of *habeas corpus* presented, in each of which the courts had dismissed the writ.

In the proceeding under the third writ, the return pleaded the two prior proceedings and the decisions therein as a bar. All matters affecting the merits existed prior to the first proceeding and determination. And the Court of Appeals (56 N. Y. 191, 192) said:

"We are of opinion that the previous adjudications in proceedings on *habeas corpus* are no answer to a new writ issued on the application of the relator. * * * In this case (unlike a controversy over the custody of an infant) the relator is restrained of his liberty; and a decision under one writ refusing to discharge him did not bar the issuing of a second writ by other court or officer."

Thaw v. Lamb, 118 N. Y. S. at 393.

A decision may be persuasive as an authority, but it is not *res judicata*. *Carter*, 105 Fed. 614, 616.

It is undeniable that some of the state decisions have proceeded, at least to some extent, on the ground that no appeal was allowed—that this was one reason at least why a decision resulting in a remand should not be an adjudication. The practice in said courts is, however, not followed in the federal courts. *Kaine*, 3

Blatchf. C. C. page 3; and in the *Carter* case, 105 Fed. at 614, in an opinion written by Justice Thayer and participated in by Justice Hook, the absence of the right of appeal could not have been controlling, because the very proceedings relied upon as an adjudication had been appealed to a Circuit Court of Appeals and presented to this court by *certiorari*. It is not amiss to add, however, that even if the absence of the right of appeal were a necessary foundation for the rule prevailing in federal courts, it is to be said that there is no right to appeal from an order of removal, as such.

The question of how far the practice of the courts of England followed in the federal courts is affected by the absence of the right to appeal, came squarely into the case of *In re Bowack*, 2 B. C. at 223, 224, decided March 20, 1892, and the court ruled that though statute had given the right of appeal, the giving the right was not a matter of exclusion, but an additional right, and that it left in force the ancient practice at the election of petitioner. The court said:

“Be this as it may, I shall assume that Mr. Bowack’s right of appeal could, if he chose to assert it, be in some way legally preserved. Then comes the question—does the fact that the legislature has expressly given him that remedy impliedly operate as a bar to the proceedings before me? These proceedings undeniably involve the question of his personal liberty and as such have in the past been regarded as a part of the subject’s constitutional rights, and therefore as rights of which he should not be deprived by mere implication; for ‘the spirit of our free institutions requires that the interpretation of all statutes shall be favorable to personal liberty,’—per Lord Abinger in *Henderson’s Case*, 2nd M. & W. 239, as cited in Maxwell. Hence I must hold that as the enactment giving the appeal has not expressly substituted it for the old practice, Mr. Bowack is entitled to the advantages which that practice gives him by seeking, as he now does, my opinion as to the legality of his arrest

and detention, regardless of the fact of his failure before another judge.

I might add that his application to me is in no sense an appeal from my Brother McCreith, but is one as to which I have to exercise a primary jurisdiction without knowledge of the materials before him and upon much more evidence as I am informed, than was presented to him."

Division IV.

Since it is the settled law that accused has the right to apply for successive writs it cannot be that the exercise of that lawful right can be nullified by naming that act an abuse of process.

The Circuit Court of Appeals for the Fifth Circuit says:

"We do not think it would be seeming or proper for this court also to pass upon the same contentions (made in the New York courts) * * * it is also, as it seems to us a palpable abuse of the writ of *habeas corpus*." (Here follows argument on some facts disclosed in the record.)

In the case at bar there was but one successive application. If, as matter of law, that constitutes an abuse of the writ the rule that permits successive applications has no room to operate in. The rule could not have been builded unless some one had followed the first application at least by one other. If the fact of using the rule once defeats the second application, then there is no rule. It would be a permit to go swimming, with an injunction not to go near the water.

No statute prohibits the repetition of the application. On the contrary the settled law says that it may be made in turn to "every judge in the land." If the fact of a second application constitutes an abuse of process then there is the lawful right to make the application coupled with a construction that its very making shall defeat it.

The second application therefore cannot constitute such abuse; at least not as matter of law.

Passing that, and assuming that a single repetition can ever constitute abuse of process, whether it is that must depend upon the peculiar facts of each case. If it is to be determined as a fact question it must be specially pleaded because, of course, abuse of process is an affirmative defense—is an avoidance.

The case at bar exhibits no such plea, nor suggestion of one. But the Circuit Court of Appeals has seen fit to consider the alleged abuse of process as a fact question. The opinion points out that appellant gave a bond in Iowa to appear in South Dakota for trial, and that in New York,

“after he had unsuccessfully attempted to prevent his removal he voluntarily gave bond for his appearance for trial and instead of complying with his bond he again thwarted a trial by applying for further writs of *habeas corpus* outside of the jurisdiction of the trial court. The fact that the same surety which surrendered the petitioner in Louisiana, instead of delivering him up for trial in South Dakota, again bound itself by new bonds, is sufficient of itself to show that the resort to the court below was not really for the purpose of enabling the petitioner to secure his liberty but was designed to obtain, if possible, a ruling upon the validity of the indictment by the court below different from the rulings made in the Second Circuit, where the former application for *habeas corpus* was made, and in the Eighth Circuit in which the trial is sought to be held.” (705-.....)

This argument is; (a) that repeating the application and in Louisiana courts constitutes an abuse of writ; (b) that noncompliance with a bond “voluntarily” given is an element in proving such abuse; (c) that the conduct of the surety proves the repetition in Louisiana was not in good faith; (d) and that abuse of process was also shown because the surrender by the surety was made in

Louisiana where appellant was found, instead of in the district of South Dakota.

We have said all we care to say for the proposition that repeating the application is a lawful act and is, therefore, not an abuse of process. To the statement of the court that this case is within the *Stallings case*, in that, the New York bond was given "voluntarily," it will be found in the return that the respondent himself declares that appellant "asked leave to give a bond conditioned for his appearance before the District Court of the District of South Dakota as in lieu and substitution for his removal by the marshal" (342-8) and the *Stallings case*, 253 U. S. 339, instead of being authority for holding that a bond given in these conditions was voluntarily given, makes it very clear that it is not, but is instead given under duress.

As to making surrender in Louisiana instead of South Dakota, the court in that district was in vacation when the surrender was made, and the surrender in Louisiana was not an abuse of process because it was the exercise of a right expressly given by statute. (See Sections 1014, 1018, 1019 R. S.)

As to the surety who surrendered later becoming the bondsman of appellant that, too, is no evidence of an abuse of process, for it is held in the case of *Grice*, 79 Fed, 627:

"Even if the writ is not authorized in behalf of a person at large on bail, yet if he surrender himself, or is surrendered by his sureties, and is in actual confinement, the writ may issue, and the court will not consider an objection that he was surrendered by collusion with his sureties."

It is further said (633):

"His sureties had an equal right to surrender him to the state, after it was given, for any cause whatever, and it is not within the province of the respondent to question

the purpose in either case. The court is of the opinion that he had the right to do either one or the other, for the purpose of testing the constitutionality of the law under a writ of *habeas corpus*, when all the facts of this case are considered."

Passing all that—and assuming that the Circuit Court of Appeals had the right to find what it did on the facts exhibited in the record, and there is furnished a conclusive argument why no such fact issue should have been considered where it was not raised on the record. Had that been done, appellant might have made proof that the repetition on his part was not captious. Surely, whether it is or is not captious must depend on the nature of the first decision. If that be clear and well considered, then though opposed to the desires of the petitioner, repeating the application might wear one aspect; if, on the other hand, the first decision bears strong indication that it is not such a decision as has just been described, repeating the application would bear a different aspect. Had abuse of process been pleaded, appellant might have shown that the surety who surrendered gave new bonds because additional indemnity had been given the surety. And made proof that the repeating of the application was not an abuse of process.

Fortunately, this record enables him to attempt a showing that he did not act captiously.

As said, it may be conceded for the sake of argument that a decision, though unfavorable to petitioner, was yet of such character as that it affords evidence of captiousness to apply again in the face of such a decision. The question of fact whether there are such decisions, remains. Extreme cases illustrate best. If some court would remand and order one to go to Dakota to be tried for murder before a justice of the peace, without a jury—it would not be an abuse of process to try another

habeas corpus application. The decision in the two circuits are of course not as drastic as the illustration. But a fair claim can be made that they are of such a nature as not to make a successive application captious. Both in the 2nd Circuit and in the 5th Circuit, the main presentation for the petitioner was the pressing upon the court of the decision of this court in the *Stever* case, 222 U. S. 167; the *Post* case, 161 U. S. 583; *Virginia v. Paul*, 148 U. S. 107. The slightest examination of them will show that, to put it mildly, they are sufficiently relevant to the contentions of appellant to be worthy of serious consideration. In both of said circuits, the decision mentions neither of these cases, nor deals with them or either of them in any way. Instead, both courts declared themselves controlled by the Circuit Court of Appeals decisions of *Moffatt*, 232 Fed. 532, and *Biggerstaff*, 260 Fed. 926. Neither of these so much as mentions or in any way deals with the *Stever* decision, the *Post* decision or the one in *Virginia v. Paul*. Neither cites any authority. One is a bald dictum. The other, based on a false premise. Objections to following these two circuit decisions were elaborately made. This avoidance is mentioned by neither court. Both refer to those decisions and to what they hold. The appellant never denied that they existed or what they ruled, but he rested wholly upon avoidances to their being recognized. As said, each of the courts simply declared that those decisions existed and that they would follow them, without any mention whatever of the avoidance.

In the opinion by the Court of Appeals for the 5th Circuit, it was presented that the lower court erred in ordering a removal after appeals to this court had been perfected. To escape the effect of that, the court created three warrants of removal where but one was ever

applied for or ever issued (41, 94, 342). By that method, it found a warrant of removal of which to say that it was not involved in the said perfected appeal, and thereupon sustained the lower court on this point.

The statement is:

"Three warrants for removal were granted the day before the appeals to the Supreme Court were allowed. Only two of these warrants were affected by those appeals. The third warrant remained unaffected, and there was nothing to prevent petitioner's removal except the subsequent allowance of an appeal by a member of this court. Our concern is, therefore, solely with the case on appeal here, in which the warrant of removal is based on a bench warrant due to a forfeiture of the bond given by the petitioner in the Southern District of New York for an appearance in the District of South Dakota."

There was but one warrant of removal, and that was the one based on the bench warrant on that forfeiture and this bench warrant was the basis of the complaint filed by Mr. Bryant in case No. 17238—one of the two in which appeal to this court was perfected, and the complaint in the Court of Appeals was that it was error to attempt the execution of removal after said appeal had been perfected. (342-48)

The warrant of removal was involved in the appeals to this court.

The *Greene* case, 52 Fed. 106, points out that in the *Terrell* case, 51 Fed. 213, Judge Lacombe properly states that the same right and duty of looking into the indictment arises upon *habeas corpus*, whether the petitioner is held under the warrant of removal, issued by the judge whose decision is thus reviewed, or under the warrant of a commissioner to await the action of the district judge. For this proposition the *Terrell* case cites numerous federal decisions.

To like effect is *In re Dana*, 68 Fed. at 891, 892, and *In re Corning*, 51 Fed. 205.

This does not appeal to one as evidencing the judicial consideration which might operate as evidence that the successive application was captious.

The Circuit Court of Appeals in the Second Circuit decided the *Olsen* case (287 Fed. at 85) on December 7, 1922. It decided the *Salinger* case (288 Fed. at 712), on March 13, 1923. The *Olsen* case declares that under the statute as now amended, the very gist of the offense was mailing in execution of the alleged scheme, and that this mailing alone gave the Federal Court jurisdiction. In the *Salinger* case, the court had before it an indictment returned in South Dakota which states on its face that the mailing was done in Iowa. The *Olsen* case is not mentioned, and removal was ordered in flat contradiction of what is ruled in the *Olsen* case, decided so recently before the *Salinger* case was, and by the same court.

The court speaks of the evidentiary offense of flight. (288 Fed. at 755, 756.) There was no evidence of flight before it. (67-75-342)

Rule Twenty-six in that court provides: "a petition for rehearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office. Rule Twenty-nine, that

"a mandate or other proper process in the nature of a procedendo may issue at any time on order of this court; but unless otherwise ordered, shall issue at the expiration of fifteen days from the filing of opinion of this court in the clerk's office unless delayed by the filing of a petition for rehearing."

Notwithstanding this, a mandate issued on the very day the opinion was filed, and thus all opportunity to apply for rehearing to obtain *certiorari* was denied in the teeth of the rules of the court. (288 Fed. at 712.) (89, 90)

All these things do not stamp the decision in the Second Circuit as being of such character as that a successive application may be held to be an abuse of process. *More*, 39 Ala. 63.

In the *Salinger* case, 288 Fed. at 755, it is pointed out, it is claimed, there should be no removal because the indictment was returned in the Western Division of South Dakota and the offending is charged to have been in the Southern Division. This point invoked Section 53 of the Judicial Code which requires that prosecution shall be had in the division wherein it is charged the offending had been done. In the *Post* case, 161 U. S. 583, it was held that a failure to observe such a requirement left the court without jurisdiction and made the indictment a nullity. The court mentions neither Section 53 nor the *Post* decision, but disposes of the point with the statement that it presents a mere formal matter—that “*the point is one of mere form.*”

We submit that the decision in the Second Circuit ought not to stamp an application for successive writs as being an abuse of process.

Decisions on former applications resulting in remand may, if their nature justifies it, be treated as precedents, but they do not constitute an adjudication. *Ex Parte Clark* (Mo.), 106 S. W. 995, 996; *Thaw*, 118 N. Y. S. 393; *Fanning*, 37 Ohio State, 344; *Meiss*, 44 Ohio State, 253, 258; *Carter*, 105 Fed. 614-15.

Opinions and decrees are evidence to show that they were rendered and entered; they are precedents, but not estoppels. *Greenleaf*, Ev. Sec. 511; *Mack*, 60 Fed. 753.

We have attempted to show that the decisions in the Second and in the Fifth Circuits should not be treated as precedents.

Part 4-1.

CONGRESS HAS ACQUIESCED IN THE FEDERAL PRACTICE.

In the case of *Kopel*, 148 Fed. 506, decided October 10, 1906, it was declared that as there was "no Federal statute limiting the common law right of the applicant for *habeas corpus* to successively petition every judge having authority in the premises without regard to the fate of his successive application * * * I consider myself bound to dispose of the matter as an original application."

In the case of *Graves* (C. C. A.), 270 Fed. at 187, decided December 21, 1920, it was said:

"The alleged abuse of the right of appeal in *habeas corpus* proceedings has been under discussion at various times in the Federal courts and must long before now have come to the attention of Congress; but down to the present time that body has manifested no disposition to limit the right of appeal in such cases except where 'the detention complained of is by virtue of the process issued out of a State court,' in which case 'no appeal to the Supreme Court shall be allowed unless the United States Court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal.' " This was done by the Act of March 10, 1908. 35 Stat. c. 76.

"And until Congress takes such action the courts should enforce the statutes as they stand, without undertaking to limit them by judicial construction."

Not only this, but in the many state cases we cite, many base the holding that successive writs are permitted upon the express ground that no statute has prohibited such application. And as said in the *Graves* case, though Congress was thus informed, constantly,

that successive writs would be entertained unless it interfered by statute, it has not yet seen fit to enact one.

There are two sides to the abuse of process argument. It may fairly be said that if it were discretionary to deny a successive application on the ground that making it constituted an abuse of process, much more harm might be done than will ever be done by the occasional instances in which the process might be said to be abused by successive applications.

The same argument has been made against denying the Federal courts the discretion to allow an appeal from a remand in *habeas corpus*. On this point, it was said in the case of *Graves*, 270 Fed. 187:

"If in *habeas corpus* cases the right of appeal may be open to abuse, and discretionary authority vested in the Court called upon to allow the appeal might in some instances be beneficial, the same would be true of the right of appeal involving property rights. But in either class of cases it might on the other hand be said that if the right were discretionary with the Court the resultant harm might be greater than the benefit."

Speaking to the possibility of the abuse of the writ, it was said in the case of *Snell* (Minn.), 16 N. W. at 692:

It may be urged that to allow the issue of successive writs will be intolerable and oppressive to the courts and to the public law officers. To this there are several answers: *First*, Business of this kind is ordinarily controlled and conducted by an honorable profession. *Second*, Experience is to the contrary. We may rest with comfortable assurance upon the fact that, after many years' trial in this country and centuries of trial in England, the right to successive writs has not been found to work any serious practical inconvenience. See remarks of Allen, J., *Tweed's Case*, 60 N. Y. 567, at bottom. *Third*, if the inconvenience were great, the citizen's right to liberty is greater.

And it should not be overlooked that it is a quite general rule that where the court declines to issue the writ,

that, while appeal will lie, the petitioner remains in custody—which is some check upon possible abuse of the writ because such abuse will hardly be engaged in if no liberation results, because on successive applications the court may decline to issue the writ.

Division V.

No giving bond or any other matter of estoppel can bar resisting removal, if the demander has no jurisdiction. For such lack cannot be cured by express consent—much less by consent by implication.

Perhaps this branch of the argument should begin with something other than we are putting first. But it will conduce to clarity if we proceed somewhat in inverse order.

Assume that this indictment charges no offense against the laws of the United States and shows that South Dakota has no jurisdiction. If that be so, what difference does it make that appellant gave an appearance bond. Surely no removal is to be ordered if nothing can be accomplished after the removal has been executed. It is said in the *Tinsley* case, 205 U. S. 20, 27 Sup. Ct. at 433, that if the indictment is in such condition, there is no justification for ordering removal “and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found.” If the indictment is in such state, what difference does it make that said bond was given. When appellant reached the trial court the indictment must on his attack be held to be a nullity, and the fact that he had given said bond would not avoid that result. In fewer words, the giving of the bond would still make the removal an idle thing because despite removal there could be no conviction and not even

a trial. Would it not be just as idle to order removal with the indictment in that condition as it would be idle, had no bond been given. Why stress its giving when nothing can be accomplished though it was given. An indictment such as this fails to supply the essential thing on removal to wit, "some competent evidence to show that an offense has been committed over which the court in the other district has jurisdiction"—*Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. at 223; *Tinsley's case*, 205 U. S. 20, 27 Sup. Ct. at 433—and there must be a discharge if there is no competent evidence.—*U. S. v. Kallas*, 272 Fed. 742. Does the fact that the appearance bond was given supply this competent evidence. Can it supply any essential thing if that thing does not exist.

Again—if there be no jurisdiction because no offense against the United States is charged over which the demander has jurisdiction, it has been held that a bond given to appear before the demander is a nullity. *Candler v. Kirksey* (Ga.) 84 American State Report 247; *Mason v. Terrell* (Ga.) 60 S. E. 4. How can it affect the right to resist removal that a so-called bond which is a piece of waste paper was given. There is no power in the demander to do *anything*, including the exacting of bonds. Interpreting the case of *Greene*, 183 U. S. 249, it is said in the *Tinsley's case*, 205 U. S. 20, 27 Sup. Ct. at 433, "if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the judge would not be justified in ordering the removal because there would be no jurisdiction to commit nor any to order the removal of the prisoner." We are justified in adding that there is not only a lack of power to do these described things, but no power to do anything, including the exacting of bonds. Speaking approvingly of a pronouncement by Judge Dillon, it is said in the case of *Corning*, 51 Fed. 206:

"A district judge who should order the removal of a prisoner when the only probable cause relied on or shown was an indictment, and that indictment failed to show an offense against the United States * * * must misconceive his duty and fails to protect the liberty of the citizen."

And in the case of *Stewart* (C. C. A.) 119 Fed. at 93, it is said that the judge misconceives his duty and fails to protect the liberty of the citizen if he issues the warrant solely on the strength of an indictment found in a foreign district which does not substantially state an offense under Federal laws."

WHEN THERE IS NO JURISDICTION, NOTHING CAN GIVE IT—NO ESTOPPEL CAN GIVE IT—AND COLLATERAL ATTACK ALWAYS AVAILS.

It is competent to attack a void judgment collaterally. *Morris*, 129 U. S. 325. Lack of jurisdiction is always open to the collateral attack involved in *habeas corpus*. *Miskimins* (Wyo.) 149 L. R. A. 836; *Farnam*, 3 Colo. 547, and cases cited.

Lack of jurisdiction may be raised at any time and in any manner. *Metcalf v. Watertown*, 128 U. S. 586; *In Re Columbia*, 101 Federal, at 970; *Ex Parte Gibson*, 31 Cal. 625. If a judgment be a nullity it may be attacked at any time by the party whose rights are sought to be affected by it. *Alexander v. Mortgage Co.* 47 Fed. at 134; *Morey* (Utah), 64 Pac. 764. In *U. S. v. Rogers*, 23 Federal, 658, a removal proceeding, it is said:

"Jurisdiction can be raised at any stage of a criminal proceeding. It is never presumed, but must always be proved; and it is never waived by a defendant."

No act on part of accused can waive lack of jurisdiction over the subject matter. *Rolett*, 6 Iowa, 534; *Morey* (Utah), 64 Pac. 764; 16 Corpus Juris 184—wherefore at-

tacks upon jurisdiction may prevail even after verdict. *Gilmer*, 129 U. S. 315, 9 Sup. Ct. at 292, 293.

The opinion of the Circuit Court of Appeals for the Fifth Circuit stresses the fact that appellant gave an appearance bond while in New York, to appear for trial in South Dakota, and that he did not appear. It is hard to tell whether this is addressed to the claim that he is barred from resisting removal because he has abused process or because the giving of such bond constitutes a waiver of his right to resist removal. We have already dealt with the first. As to the second, to say the least, the giving of a bond could not be a waiver unless it was given voluntarily. We have already called attention to the fact that on reason and on the authority of the *Stallings* case the bond was not given voluntarily, but was given because the only other option was to suffer physical removal instantly.

Passing that—such questions of estoppel by adjudication or by abuse of process or by the giving of bond have no place in these appeals. If the District Court of the U. S. for South Dakota has jurisdiction and the indictment is a valid one, defendant must submit to removal even if he had never made an application which could be treated as a former adjudication, if he had never abused process and had never given a bond. If, on the other hand, that court has no jurisdiction and the indictment made the basis for removal is a nullity, it does not matter what the petitioner has done—this, for the simple reason that nothing he can do can waive the lack of jurisdiction or confer jurisdiction where it does not exist.—*Rogers*, 23 Fed. 658. If the demander has no jurisdiction, the bond is waste paper.

The bond is void where nothing could be done in the trial court in which the bond agrees to make appearance.

Kingsbury's case, 1 Conn. *page 407.

It is void where taken in a proceeding under an information made in one state which is not the state where the crime was perpetrated.

State v. Hufford, 28 Ia. 391.

Is ineffective where there is a failure to charge crime, in that substantial elements are omitted in the indictment.

Mason (Ga.) 60 S. E. 4.

Marks (Ga.) 60 S. E. 1016.

Rogers, (Ga.) 75 S. E. 1131.

Where the indictment fails to charge an offense it is the same as if there were no indictment and the bond is void.

Candler (Ga.) 38 S. E. 825.

State v. Woodley, 25 Ga. 235.

McDaniel, 78 Ga. 188.

Mason (Ga.) 60 S. E. 4.

The bond is void if taken before information or indictment.

Baker (Tex.) 111 S. W. 735.

Ochoa (Tex.) 102 S. W. 415.

Leal (Tex.) 102 S. W. 414.

A bond is ineffective where either physically or in the eyes of the law there is an absence of indictment.

Brown (Tex.) 3 S. W. 478.

Welis (Tex.) 2 S. W. 806.

Brown (Tex.) 6 S. W. at 190.

Where in the eye of the law the indictment is void, it is as nonexistent as if it had never been physically created.

Brown (Tex.) 3 S. W. 478.

Wells (Tex.) 2 S. W. 806.

Brown (Tex.) 6 S. W. at 190.

State v. Hufford, 28 Iowa, 391.

"If, then, the indictment in this case is fatally defective, not only in not charging the defendant with the particular offense for which he was recognized to appear, but with none other, then the party stands unindicted to this time, and there has necessarily been no breach of his bond. This decision was cited and approved in *State v. Woodley*, 25 Ga. 235, and in *McDaniel v. Campbell*, 78 Ga. 188. We think as held in these cases, that an indictment which charges the principal in the recognizance with no offense against the state amounts to no indictment and that the sureties may set up its invalidity in defense to a *scire facias* to forfeit the recognizance.

Chandler v. Kirksey, 113 Ga. 309, 84 Amer. St. Rep. 247.

"That the indictment is a nullity is a good defense to a proceeding to forfeit a criminal bond requiring the presence of the defendant to answer such indictment. Consequently it was error to direct a verdict in favor of the plaintiff in *scire facias*, where it appeared that the obligation was based upon an indictment fatally defective. The case is not altered by reason of the fact that the recognizance was entered into after indictment, instead of prior to the action of the grand jury."

Mason v. Terrell (Ga.) 60 S. E. 4.

It follows that the giving of the bond is no bar to resisting removal. If the demanding district and court have no jurisdiction no power existed to demand the bond, nor for the government to become a party to it. If that be so, the bond is one-sided and it is not an "agreement" to appear, because one party of two cannot alone make what is an agreement. If there was no power to exact the bond, the case stands as though its exaction were prohibited by law, and an instrument thus prohibited can effect nothing. It stands as if the appellant had never signed it. A court without jurisdiction does not have the power to obtain an "agreement" that someone shall appear in and answer to it. To make the

bond anything but a piece of waste paper there must be power to take bond.

Schneider (Ky.) 3 Mete. 409.

Matthews (Ala.) 9 So. 740.

Hendricks, 7 Ky. 328.

Rogers, 14 Mich. 392.

Townsend, 14 Mich. 388.

Nothing done by a court that has no jurisdiction can give power to do anything; all its acts are nullities. *Newcomb's case*, 27 Iowa, at 288, citing Judge Marcy; *People v. Liscomb*, 60 N. Y. *571.

The most that the giving of the bond or the other claimed estoppels can possibly amount to is that, by implication, they consent to submitting to the indictment and to the court in which it was returned. It is horn book law that a want of jurisdiction cannot be cured by the most express and explicit of consents. And of course what cannot be done expressly cannot be done impliedly. To say this is but to repeat what has been said a thousand times—that consent cannot confer jurisdiction.

In *U. S. v. Conners*, 111 Fed. 734, it was ruled:

"There can be no order of removal upon consent of the party whose removal is sought, where the facts charged in the indictment do not constitute a crime."

It would not matter if appellant had signed a stipulation that he would appear and submit to trial. It would not matter if he went through trial and past conviction and sentence, without urging that the indictment was a nullity, and that there was no power to proceed against him under it.

In *State v. Rollett*, 6 Iowa, 534, the defendant not only raised no question as to the jurisdiction of the court during his trial, but pleaded guilty and paid the fine and costs imposed against him. Thereupon, he appealed, and

the defendant urging that the court had no jurisdiction, the court said:

"We think the defendant was not estopped from assigning errors upon the judgment and proceedings of the District Court, by the fact that he had discharged the fine and costs, imposed upon him by the judgment of the court, before taking his appeal."

In *State v. Morey*, Utah, 1901, 64 Pac. 764, defendant seems to have been tried under an unconstitutional act. He raised the want of jurisdiction for the first time on appeal—and the court said:

"Nor can the fact that the question of jurisdiction, resulting from the failure to file the information as provided by law, was made for the first time in this court, avail the state. In a case like the one at bar the prisoner has a constitutional right to have his case tried by a court having jurisdiction. His mere silence or failure during the trial to object to the jurisdiction assumed by the court did not constitute a waiver of that right, or prevent him, under such circumstances as are shown, herein, from raising the question at any subsequent stage of the proceedings, or after the trial."

It is said in 16 Corpus Juris, 184:

"The objection that the court is not a legal court, or that it has not jurisdiction of the offenses, cannot be waived, and may, therefore, be taken at any time."

Jurisdictional attacks are available even after verdict. *Gilmer*, 129 U. S. 315, 9 Sup. Ct. Rep. at 292, 293.

This is in the title "Criminal Law," (16 Corpus Juris) and at the end of Section 257, beginning on the same page:

"The objection that the court has no jurisdiction of the subject matter is not waived by plea, or by going to trial, and may be raised on motion in arrest of judgment, on appeal, or by a writ of *habeas corpus*."

In a word, express consent and acquiescence and silence all through the trial would not give South Dakota jurisdiction if it lacks it.

It does not cure lack of jurisdiction that demurrer be interposed.

Post, 16 Sup. Ct. 12; 161 U. S. 583.

Nor that demurrer is interposed and then answer made.

Orcutt, 71 Iowa, 514.

Nor answering, demurring or by plea to the merits.

Southern Pacific Co. v. Denton, 146 U. S. 202,

13 Sup. Ct. at 46;

Railway v. Pinkney, 13 S. C. at 860.

Rogers, 23 Fed. 658.

Jurisdiction is not conferred by awaiting ruling on a plea of former adjudication to be decided.

Morris, 9 Sup. Ct. 289, 129 U. S. 315.

It is not conferred by pleading.

Cox, 88 Fed. 346.

Chappell, 155 U. S. 192.

It is not given where there is an overruled demurrer.

Ex Parte Nielsen, 9 Sup. Ct. 672, 131 U. S. 176.

It would seem to follow, inevitably, that nothing appellant may have done, including the giving of the bond, has the slightest tendency to bar him from resisting removal on the ground that the demanding court and district have no jurisdiction over the subject matter, and that the indictment which is made the basis of removal proceedings is therefore a nullity.

Division VI.

The matters presented here are each and all reviewable by habeas corpus.

Some of the decisions which we have invoked and in which it is held that such an indictment as the one at bar is a nullity for lack of jurisdiction were not removal case decisions. But that is adventitious. It does not matter under what circumstances a decision declaring a lack of jurisdiction is made. Whenever it is decided that there is no jurisdiction it is also decided that collateral attack lies; and, of course, *habeas corpus* is such an attack. This is not changed by the fact that lack of jurisdiction may also be availed of on direct attack. In the *Stever* and the *Chenault* cases an indictment such as the one at bar was successfully attacked but, respectively, by writ of error and motion for new trial.

There is every reason to believe that the District Court of the United States for the Eastern District of Louisiana held against petitioner on the ground that *habeas corpus* was not the permitted method of review. We say this because on motion for new trial that court in the case of *Chennault* held squarely that it must discharge because the indictment had been returned in a division wherein no offending was charged to have taken place.

The decision should, however, have been the same had it been made in response to collateral attack. In other words, a want of jurisdiction may be availed of either by direct or by collateral attack. When there is no jurisdiction then, in the eyes of the law, there is no court and no judicial action—and in such case there is no rule providing that a nullity can be attacked in one way only.

In Iowa (Section 3561, Code 1897) there is a statute making want of jurisdiction a ground for demurrer, but

the reports of that state have numerous cases wherein want of jurisdiction was successfully urged in collateral attack. See for one, the case of *Orcutt*, 71 Iowa 514.

It is the settled law that want of jurisdiction can be successfully attacked by *habeas corpus* even if it might also have been done by direct attack.

If the court has exceeded its jurisdiction there will be discharge on *habeas corpus*, though relief might have been had by petition in error.

Ex Parte Miskimins, 49 L. R. A. 836, Wyo.

.....
In re Boulter, 40 Pac. 520, Wyo.

It is no argument that the party might have appealed within a limited time and had neglected to do so and is, therefore, without remedy, and must continue in confinement.

Yates v. People, 6 Johns (N. Y.) 164.

Though the party may appeal he may also attack by *habeas corpus*.

Rogers, 23 Fed. 658.

We concede freely there are many things that cannot be reviewed by *habeas corpus*. But we are not concerned with those. The controlling question here is what *can* be reviewed by *habeas corpus*. Our contention is that no matter what may not be thus reviewed, what we are presenting is under well settled law so reviewable.

Referring to *In re Buell*, 3 Dill. 120, 121; *In re Terrell*, 51 Fed. 213; *In re Dana*, 68 Fed. 886; *In re James*, 18 Fed. 853, and *U. S. v. Brawner*, 7 Fed. 86—it is said in *Stewart v. U. S.* (C. C. A.) 119 Fed. at 93:

“The practice of issuing a writ of *habeas corpus* in such cases for the purpose of inquiring into the validity of an indictment on the strength of which a person has

been committed to await the issuance of a warrant of removal under Section 1014, R. S. was also sanctioned and approved by the Supreme Court of the United States, in the case of *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, and *Horner v. U. S.* 143 U. S. 207, 12 Sup. Ct. 407."

In *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569; *Beavers v. Henkel*, 24 Sup. Ct. 606, 194 U. S. 73; *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, and in *Tinsley's* case, 205 U. S. 20, 27 Sup. Ct. 430 (in which there was a reversal for refusal to discharge), the Supreme Court reviewed appeals from dismissals and remand on *habeas corpus*.

Appeal involving venue, and from refusal to discharge on *habeas corpus*, was entertained in *Brown v. Elliott*, 225 U. S. 392, 32 Sup. Ct. 812. In the *Tillinghast* case, 225 Fed. at top 228, and 234, there was review and reversal on the authority of the above named cases decided by the Supreme Court of the United States.

Questions like the ones at bar were reviewed on *habeas corpus* in the cases of *In re Greene*, 52 Fed. 104; *In re Price*, 83 Fed. 830, and *In re Price*, 89 Fed. 84.

Undoubtedly, one reason for this practice is that *habeas corpus* lies where there is a detention in violation of the Constitution or of the laws of the United States.

Where the indictment is returned in a district in which no offense was committed, removal under it would be a violation of the Sixth Amendment to the Constitution. *Pereless*, 157 Fed. 419; *Beshears*, 79 Fed. 73; *In re Greene*, 53 Fed. at 106, 107; *Fries*, 284 Fed. at 827; *Benson*, 17 L. R. S. (N. S.) at 1250. This constitutional provision fixes venue, *Tillinghast*, 225 Fed. 232; *Ex Parte Lair*, 177 Fed. 790. The *Tillinghast* case, 225 Fed. at 232, a removal case, quotes from and applies the *Burr* decision, that certain flaws in the indictment invoke a question of constitutional right (232)—and say, that if

such an indictment is to be sustained "then the *prima facie* effect of an indictment as evidence of probable cause is entirely destroyed." (230, 231.)

And violations of constitutional guaranties are reviewable in *habeas corpus*. *Ex Parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 675, because disobedience of the Constitution and denying rights given by it work lack of jurisdiction, even where the court, in a general sense, has jurisdiction. Brown Juris. approved in *Miskimins* (Wyo.), 49 L. R. A. 836.

Review by *habeas corpus* lies where instead of a violation of the Constitution there is a violation of the laws of the United States. *Cunningham*, 135 U. S. 1, 10 Sup. Ct. Rep. 658, 660; *Siebold*, 110 U. S. 374, 376, 377; *Ex Parte Virginia*, 100 U. S. 343; *Ex Parte Lange*, 18 Wall. 163; *Beavers*, 194 U. S. 85, 24 Sup. Ct. at 606, 607; *Miskimins* (Wyo.), 49 L. R. A. 831, 836. This has been applied to the law dealing with where the grand jury must act. *Beavers*, 194 U. S., top 85. And to the law dealing with division venue; *Chenault*, 230 Federal 942; *Christopherson*, 261 Fed. 226.

Speaking of *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, it is said in *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. at 432, 433:

"Mr. Justice Peckham, in delivering the opinion, was careful to say that it was not held that where the indictment charged no offense against the United States or the evidence failed to show any, or, if it appeared that the offense charged was not committed or triable in the district to which the removal was sought, the judge would be justified in ordering the removal, because there would be no jurisdiction to commit or any to order the removal of the prisoner. 'There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual

named in the charge, and that there is probable cause for believing him guilty of the offense charged."

In the case of *Henry v. Henkel*, 235 U. S. 219, 35 Sup. Ct. 54, it is said:

"The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or warrant making an offense of the acts charged. In such case, the committing court would have no jurisdiction, the prisoner would be in custody without warrant of law, and, therefore, entitled to this discharge," citing *Greene* 183 U. S. 261, 22 Sup. Ct. 218.

On an application for removal of a prisoner, under Rev. St. No. 1014, where the only ground for the warrant is an indictment pending in the District Court of the district to which the removal is sought, and it appears from said indictment that the court has not jurisdiction of the alleged offense, the defendant should be discharged. That is the necessary implication from the statute.

Lee, 84 Fed. 626; *Pope*, 27 Fed. cases, 593; *Greene*, 52 Fed. 104 and 615; *Wolf*, 27 Fed. 606; *Dana*, 68 Fed. 886; *James*, 18 Fed. 853; *Doig*, 4 Fed. 193; *Buell*, 4 Fed. case 587; *Rogers*, 23 Fed. 658; *Terrell*, 51 Fed. 213; *Braner*, 7 Fed. 86.

In *U. S. v. Lynn*, 284 Fed. 907, it is settled that if the demanding court is without jurisdiction the indictment is a nullity as evidence, and it is at least implied that if that be its state this may go to the jurisdiction of the commissioner to act, *affirmatively*.

These rules have been applied to a case where the lower court disregarded a plea, and so made a second conviction for the same offense possible. *Ex Parte Nielsen*, 124 U. S. 309, 9 Sup. Ct. 672, 674. And this court added:

"And why should not such a rule prevail *in favorem libertatis*. If we have seemed to hold the contrary in any case, it has been done from inadvertence."

In the case of *Greene*, 52 Fed. 106, many cases are cited for the proposition that in removal proceedings under Section 1014 the court makes judicial inquiry on whether the indictment charges an offense and whether the court in which indictment was returned had jurisdiction. It declares that such investigation is the uniform practice of the federal court.

If the Supreme Court should rule on appeal from a refusal to discharge that the indictment is void, it would so hold on appeal from a conviction. Can it be possible it would send the petitioner to the trial court there to object to the indictment, merely to the end that if overruled and convicted, it may, on appeal from that, say for the first time that the indictment is void.

Where the error is apparent and the imprisonment unjustified, the Appellate Court may perhaps in discretion give immediate relief on *habeas corpus*, thus saving the party the delay and expense of a writ of error.

Ex Parte Siebold, 100 U. S. 375.

Respectfully submitted,

B. I. SALINGER,
Attorney for Appellant.



SIXTH AMENDMENT TO THE CONSTITUTION OF THE
UNITED STATES.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Sec. 3, Article 3, Constitution of the United States.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

Section 53, Judicial Code.

When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All means and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the state contains more than one district, then in any of such districts, as provided in the preceding section. All *prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed*, unless the court, or the judge thereof, *upon the application of the defendant*, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded within said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall

be to the United States District Court in the division in which the county is situated from which the removal is made; and the time within which the removal by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division. (36 Stat. L. 1101.)

Sec. 215 Crim. Code, page 12796.

Using the mails to promote frauds; counterfeit money punishment for.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thou-

sand dollars, or imprisoned not more than five years, or both. R. S. Sec. 5480, as amended Act March 2, 1889, C. 303, Sec. 1, 25 Stat. 873. Act March 4, 1909, C. 321, Sec. 215, 35 Stat. 1130.

Sec. 1674, Compiled Statutes, 1916. (R. S. Sec. 1014.)

Offenders against the United States, how arrested and removed for trial.

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

Sec. 1682. (R. S. Sec. 1018.) Surrender of criminals by their bail.

Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneration of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

Sec. 1683. (R. S. Sec. 1019.) New bail to be given in certain cases.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.

SALINGER, JR. v. LOISEL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA.

SAME v. SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

SALINGER, JR. v. UNITED STATES, AND LOISEL, AS UNITED STATES MARSHAL, EASTERN DISTRICT OF LOUISIANA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 341, 342, 705. Argued January 14, 15, 1924.—Decided May 26, 1924.

1. Warrants of removal issued in triplicate are in legal effect but a single warrant, and defendant who had secured a *supersedeas* on appeal from an order refusing relief by *habeas corpus* from arrest under one, could not lawfully be arrested under another. P. 228.
2. Where an accused person, on being surrendered by his surety and instituting *habeas corpus* proceedings, is rearrested in removal proceedings, due practice requires that a test of the second confinement, involving only the same questions, be had by amendment of the existing petition in *habeas corpus*; and where a second petition is erroneously brought, the two should be consolidated and heard as one case, thus avoiding the confusion and expense of double appeals. P. 229.
3. The common-law doctrine of *res judicata* does not extend to a decision on *habeas corpus* refusing to discharge a prisoner. P. 230.
4. But, in the exercise of its sound, judicial discretion "to dispose of the party as law and justice may require," (Rev. Stats. § 761,) a federal court may base its refusal to discharge on a prior refusal; and, as a safeguard against abuse of the writ, the applicant in any case may be required to show whether he has made a prior application and, if so, what was done on it. *Id.*
5. Under the Sixth Amendment, an accused cannot be tried in one district under an indictment showing that the offense was committed in another district. P. 232.

6. Nor is there any authority for a removal to a district other than that in which the trial may constitutionally be had. P. 232.
 7. Under § 215 of the Criminal Code, to knowingly cause a letter to be delivered by mail, in accordance with the direction thereon, for the purpose of executing a fraudulent scheme, is an offense separate from that of mailing the letter, or causing it to be mailed, for the same purpose; and, where the letter is so delivered as directed, the person who caused the mailing causes the delivery, at the place of delivery, and may be prosecuted in that district although he was not present there. P. 233.
 8. Under Jud. Code, § 53, when a district contains several divisions, the trial (in the language of the statute, the "prosecution") of an offense must be in the division where it was committed, unless the accused consents otherwise; but the indictment may lawfully be returned in another division of the same district. P. 235.
 9. Resistance to removal having been unreasonably protracted, the Court directs immediate issuance of its mandate, with orders requiring that the accused under his bonds surrender himself within ten days to the marshal in the district of the removal proceeding or the district of the indictment. P. 238.
- Nos. 341 and 342, affirmed.
295 Fed. 498 (No. 705,) reversed.

APPEALS from two orders of the District Court refusing release in *habeas corpus*; and certiorari to a judgment of the Circuit Court of Appeals affirming a like order made on a third application.

Mr. B. I. Salinger, with whom *Mr. St. Clair Adams* and *Mr. L. H. Salinger* were on the briefs, for appellant and petitioner.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee and respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

These three cases involve certain phases of a protracted resistance by B. I. Salinger, Jr., to an effort by the United

States to have him removed to the District of South Dakota to answer an indictment for a violation there of § 215 of the Criminal Code, which makes it a punishable offense to use the mail for the purpose of executing a scheme or artifice to defraud.

The indictment was returned in the District Court for the District of South Dakota when sitting in the western division, and the offense was charged as committed in the southern division; but the grand jury which returned the indictment had been impaneled from the body of the district regardless of the divisions and instructed to inquire into and make due presentment of offenses committed in any part of the district. After receiving the indictment the court, at the suggestion of the United States Attorney, remitted it to the southern division for trial and other proceedings. A bench warrant was issued for Salinger's arrest, and he appeared before a commissioner in Iowa and gave bond for his appearance in the southern division on the first day of the next term. But he failed to appear, and the bond was declared forfeited.

Later, Salinger being in New York City, a proceeding was begun before a commissioner there for his arrest and removal to South Dakota under § 1014 of the Revised Statutes. He was arrested, taken before the commissioner, and accorded a hearing. The indictment was produced, he admitted he was the person charged; and on the evidence presented the commissioner found there was probable cause and committed him to await the issue of a warrant of removal. He then sued out a writ of *habeas corpus* in the District Court for that district; but after a hearing the court discharged the writ, remanded him to the marshal's custody, and issued a warrant for his removal. On his appeal, that decision was reviewed and affirmed by the Circuit Court of Appeals for the Second Circuit. 288 Fed. 752. He made no attempt to obtain any other or further review. When the mandate of the

Circuit Court of Appeals went down, to avoid being removed in the custody of the marshal, he gave a bond for his appearance two weeks hence in South Dakota. Again he failed to appear, and that bond was declared forfeited.

After giving the bond in New York and before the day stipulated therein for his appearance in South Dakota, Salinger went to New Orleans, appeared with a representative of the surety in that bond before a commissioner there, and was surrendered by the surety's representative to the marshal of that district in the commissioner's presence. Such a surrender in a distant district may not have been in accord with § 1018 of the Revised Statutes and may not have discharged the surety, but nothing turns on that here. The surrender seems to have been made with Salinger's full consent; but, however made, it constituted no obstacle to further proceedings for his removal. The commissioner accordingly directed that he be held in the marshal's custody to await the institution of such a proceeding. He then sued out a writ of *habeas corpus* in the District Court at New Orleans and was admitted to bail pending a hearing on the writ.

In a few days—during which Salinger failed to appear in South Dakota as stipulated in the bond given in New York—a proceeding for his arrest and removal under § 1014 was begun before the commissioner in New Orleans. He was arrested, taken before the commissioner, and accorded a hearing. The indictment was produced; evidence was presented tending to show he was the person charged; and he gave testimony tending to show he was not in South Dakota at the times he was charged with unlawfully using the mail. On all the evidence the commissioner found the requisite identity and probable cause, and committed him to await the issue of a warrant for his removal. He then sued out another writ of *habeas corpus* in the District Court, and was admitted to bail pending a hearing on the writ.

On a hearing in the two cases all the proceedings in South Dakota, New York, the Circuit Court of Appeals for the Second Circuit, and New Orleans which have been recited herein were produced in evidence, and on consideration thereof the court discharged both writs of *habeas corpus*, remanded Salinger to the marshal's custody, and issued a warrant for his removal. Direct appeals to this Court in the two cases were then prayed by Salinger and allowed by the District Court, it being especially directed in both cases that the appeal operate as a supersedeas on Salinger's giving approved bail. The bail was given and approved. These cases are Nos. 341 and 342.

Notwithstanding the supersedeas so effected, Salinger was taken into custody by the marshal under the warrant of removal with a view to executing its command. He then sued out a third writ of *habeas corpus* in the District Court,—his petition therefor being like his earlier petitions, save as in it he additionally complained that his detention under the warrant of removal was in contravention of the supersedeas allowed on the appeals in Nos. 341 and 342. After a hearing the District Court discharged the writ of *habeas corpus* and remanded him to the marshal's custody for removal under the warrant. An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, where the decision was affirmed. 295 Fed. 498. The case is here on certiorari, 263 U. S. 683, and is No. 705. Bail in this case was allowed and given here when certiorari was granted.

In disposing of the additional ground of complaint advanced in No. 705 the Circuit Court of Appeals proceeded on the assumption that there were three distinct warrants of removal and that one of these was neither involved in the appeals in Nos. 341 and 342 nor covered by the supersedeas. But the assumption was not well founded. There was but one proceeding for removal before the

commissioner in New Orleans and it was based on the single indictment in South Dakota. There also was but one commitment for removal in that proceeding. The warrant of removal issued by the District Court was based expressly on that commitment; but for reasons not explained the warrant was issued in triplicate. In substance, form and date the three papers were identical. Taken either collectively or separately they embodied a single command, which was that the marshal "forthwith" remove Salinger to South Dakota and there deliver him to the proper authority to be dealt with under the indictment. To execute the command of one triplicate was to execute that of all. In legal effect therefore there was one warrant, not three. One was all that was sought, and no basis was laid for more. The obvious purpose of the supersedeas was to stay the execution of the command for removal pending the appeals to this Court in Nos. 341 and 342, and of course that purpose could not be thwarted by merely duplicating or triplicating the warrant embodying the command. It follows that the additional ground of complaint advanced in No. 705 was well taken. But, as that ground could be effective only during the life of the supersedeas in Nos. 341 and 342, it has no bearing on the decision to be given in them on the right to remove.

Before coming to the questions presented in those cases we think the procedure which was followed in them calls for comment. The first case was begun when Salinger was committed by the commissioner to await a proceeding for his removal. Later when such a proceeding was begun and the commissioner definitely committed him to await the issue of a warrant of removal, that change in the situation should have been shown in the first case by an appropriate amendment or supplement to the petition instead of being made the basis of a new and separate case. And when, in disregard of the propriety of taking that course,

the second case was begun, the two should have been consolidated and conducted as one. The parties were the same and the cases presented a single controversy. Maintaining them separately was productive of confusion and led to two appeals to this Court, when had the right course been taken one appeal plainly would have sufficed and would have lessened by one half the printing and other costs. As it is now, one record is largely a duplication of what appears in the other and both are exceedingly confusing. The course that was taken should not have been selected, nor should the court have permitted it.

In Nos. 341 and 342 the right to arrest and remove in virtue of the indictment was questioned on the same grounds that were set up in the earlier case in New York, where that right was upheld. Because of this situation, counsel for the appellee invoke the doctrine of *res judicata* and insist that the decision in the New York case was a final adjudication of the right and is binding on all other courts, including this Court. We are unable to go so far. At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute; the lower federal courts usually have given effect to it; and this Court has conformed to it and thereby sanctioned it, although announcing no express decision on the point. The cases of *Carter v. McClaghry*, 183 U. S. 365, 378, and *Ex parte Spencer*, 228 U. S. 652, 658, are notable instances. We regard the rule as well established in this jurisdiction.

But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent

judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed.

The federal statute (§ 761, Rev. Stats.) does not lay down any specific rule on the subject, but directs the court “to dispose of the party as law and justice may require.” A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *Ex parte Mirzan*, 119 U. S. 584; *Cook v. Hart*, 146 U. S. 183; *In re Frederick*, 149 U. S. 70; *New York v. Eno*, 155 U. S. 89; *In re Chapman*, 156 U. S. 211; *Riggins v. United States*, 199 U. S. 547; *In re Lincoln*, 202 U. S. 178; *Henry v. Henkel*, 235 U. S. 219; *Ex parte Cuddy*, 40 Fed. 62; *In re Simmons*, 45 Fed. 241; *Ex parte Moebus*, 148 Fed. 39; *In re Kopel*, 148 Fed. 505. The decision in the *Cuddy Case* was on a second application, and was given by Mr. Justice Field. While holding the doctrine of *res judicata* inapplicable, he said, “the officers before whom the second application is made may take into consideration the fact that a previous application has been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be

affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it."

In practice the rules we here have outlined will accord to the writ of *habeas corpus* its recognized status as a privileged writ of freedom, and yet make against an abusive use of it. As a further safeguard against abuse the court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application and, if so, what action was had on it.

Here the prior refusal to discharge was by a court of coördinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the later applications on that ground, its discretion would have been well exercised and we should sustain its action without saying more. But its decision does not appear to have been put on that ground; and, as circumstances are disclosed which make it appropriate that we consider and pass on two of the objections urged against a removal, we turn to them.

Both objections go to the jurisdiction of the court before which it is proposed to take and try the accused. One is that under the Sixth Amendment to the Constitution there can be no trial in the District of South Dakota because the indictment shows that the offense charged was not committed in that district but in a district in Iowa, and the other that, even if the indictment be taken as charging an offense in the District of South Dakota, it shows that it was returned in a division of that district other than the one in which the offense was committed.

It must be conceded that under the Sixth Amendment to the Constitution the accused can not be tried in one district on an indictment showing that the offense was not committed in that district; and it also must be conceded that there is no authority for a removal to a dis-

strict other than one in which the Constitution permits the trial to be had. We proceed therefore to inquire whether it appears, as claimed, that the offense was not committed in the district to which removal is sought.

The material part of § 215 of the Criminal Code on which the indictment is based reads:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . shall, for the purpose of executing such scheme or artifice . . . place, or cause to be placed, any letter . . . in any post-office, . . . or authorized depository for mail matter, to be sent or delivered, . . . or shall knowingly cause to be delivered by mail according to the direction thereon . . . any such letter, . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.”

The indictment charges that the defendants, of whom Salinger is one, devised a scheme and artifice to defraud divers persons by means described, and thereafter, for the purpose and with the intent of executing their scheme and artifice, did unlawfully and knowingly “cause to be delivered by mail” according to the direction thereon, at Viborg within the southern division of the District of South Dakota, a certain letter directed to a named person at that place, the letter and the direction being particularly described. The indictment then adds, in an explanatory way (see *Horner v. United States*, 143 U. S. 207, 213), that on the day preceding the delivery the defendants had caused the letter to be placed in the mail at Sioux City, Iowa, for delivery at Viborg according to the direction thereon. There were other counts in the indictment but they need not be particularly noticed, for the one just described is a fair sample of all.

Section 215 is a reënactment, with changes, of an earlier statute which made it an offense for the deviser of a scheme or artifice to defraud to place or cause to be placed

in the mail any letter in furtherance thereof, but did not contain the clause making it also an offense for the deviser to cause such a letter "to be delivered by the mail according to the direction thereon." Under the original statute the offense was held to be complete when the letter was placed in the mail depository for transmission, and the place of the deposit was held to be the place of commission, regardless of whether or where the letter was delivered. The appellant insists that the introduction of the new clause into the statute as reenacted is not of material significance here. We are of a different opinion. That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in furtherance of it to be delivered by the mail according to the direction on the letter. This is done by way of enlarging the original definition of the offense, the clause dealing with the placing of such a letter in a mail depository being retained. Evidently Congress intended to make the statute more effective and to that end to change it so that, where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit. A letter may be mailed without being delivered, but, if it be delivered according to the address, the person who causes the mailing causes the delivery. Not only so, but the place at which he causes the delivery is the place at which it is brought about in regular course by the agency which he uses for the purpose. *United States v. Kenofsky*, 243 U. S. 440, 443. Were the Government attempting to prosecute at both places, a question might arise as to whether it should be required to elect between them (see *Haas v. Henkel*, 216 U. S. 462, 474); but, as there is no such attempt here, that question need not be considered. The appellant relies on *United States v. Stever*, 222 U. S. 167, as showing that the offense was committed at the place of the deposit and not at that

of the delivery; but the case is not in point. It arose before the statute was changed. The indictment there was in two counts. One was based on the original statute and was expressly abandoned by the Government. The other was based on another statute relating to the use of the mail in promoting lotteries and other schemes of chance.

We conclude that there is no sound basis for the claim that the indictment shows that the offense was not committed in the district to which removal is sought. An effort was made to strengthen that claim by producing testimony tending to show that Salinger was not in that district at the time. But of that effort it suffices to say that the nature of the offense is such that he could have committed it, or have participated in its commission, even though he was not then in the district. *In re Palliser*, 136 U. S. 257; *Horner v. United States*, 143 U. S. 207, 213; *Burton v. United States*, 202 U. S. 344, 386.

The objection that the indictment was not returned in the division in which it charges the offense was committed, and therefore that jurisdiction could not be founded on it, is based on a provision of § 53 of the Judicial Code reading as follows:

"When a district contains more than one division, . . . all prosecutions for crimes or offenses shall be had within the division . . . where the same were committed, unless the court, or the judge thereof, upon application of the defendant, shall order the cause to be transferred for prosecution to another division of the district."

South Dakota constitutes a single judicial district with one District Court; but the district is divided into four divisions where sessions are held at times fixed by law, such sessions whether in one division or another being "successive terms of one and the same court." *Hollister v. United States*, 145 Fed. 773, 782. A like situation exists in many of the States.

Formerly special statutes applicable to particular districts indicated the division in which criminal proceedings should be had, but the statutes were not uniform. Some provided that crimes and offenses should be "indictable" and triable only in the division where committed, or that all criminal proceedings should "be brought" and had in such division. But the greater number, in varying terms, required that the trial be in that division, unless the accused consented to its being in another. In districts where the latter were in force, it was common to impanel a grand jury from the district at large, to charge such grand jury with the investigation and presentment of offenses committed in any part of the district, and when indictments were returned to remit them for trial and other proceedings to the divisions wherein the offenses were committed, save as the defendant assented to a disposal in another division. The practice is illustrated in *Logan v. United States*, 144 U. S. 263, 297, and *Rosencrans v. United States*, 165 U. S. 257. The general provision in § 53 here relied on superseded the special statutes. It obviously is less restrictive in its terms than some of them were; and the prevailing practice under it has been like that theretofore followed in districts where the less restrictive provisions were in force. See *Biggerstaff v. United States*, 260 Fed. 926; *United States v. Chennault*, 230 Fed. 942.

The contention is that the word "prosecution" in the general provision includes the finding and return of an indictment. That the word sometimes is used as including them must be conceded. But there are also relations in which it comprehends only the proceedings had after the indictment is returned. Here we think it is used with the latter signification. It appears twice in the provision, doubtless with the same meaning. The first time is in the clause directing that "all prosecutions" be had in the division where the offense was committed, and the second

is in the clause permitting the court or judge, at the instance of the defendant, to order "the cause to be transferred for prosecution" to another division. The connection in which it appears the second time shows that it refers to the proceedings after the indictment is found and returned, that is to say, after there is a cause susceptible of being transferred. Besides, had Congress intended to put an end to the prevailing practice of impaneling a grand jury for the entire district at a session in some division and of remitting the indictments to the several divisions in which the offenses were committed, unless the accused elected otherwise, it is but reasonable that that intention would have been expressed in apt terms, such as were used in some of the exceptional special statutes. That practice was attended with real advantages which should not be lightly regarded as put aside. In many divisions only one term is held in a year. If persons arrested and committed for offenses in those divisions were required to await the action of a grand jury impaneled there, periods of almost a year must elapse in many instances before a trial could be had or an opportunity given for entering a plea of guilty and receiving sentence.

In our opinion the real purpose of the provision, that which best comports with its terms when taken in the light of the circumstances in which it was enacted, is to require, where a district contains more than one division, that the trial be had in the division where the offense was committed, unless the accused consents to be tried in another. The Circuit Court of Appeals so held in a well considered opinion in *Biggerstaff v. United States*, *supra*. The only decision the other way, of which we are advised, was by the District Court for the Eastern District of Louisiana in *United States v. Chennault*, *supra*; and that court receded from that decision in the cases now before us.

The appellant relies on *Post v. United States*, 161 U. S. 583, as making for the contrary conclusion. But it does not do so. The case turned on a special statute, now superseded, declaring that "all criminal proceedings" for offenses in the District of Minnesota "shall be brought, had and prosecuted" in the division in which the same were committed. The difference between that special direction and the general one now before us is so marked that further comment is not required.

Other objections to the removal are urged, but those we have discussed and overruled are all that can with any propriety be regarded as open to consideration on these appeals.

A survey of the records before us shows that the resistance to removal has been unreasonably protracted. The mandate in these cases will issue forthwith and will embody an order requiring, under the bail given on the appeals in Nos. 341 and 342 and under that given on the granting of the writ of certiorari in No. 705, that Salinger surrender himself into the custody of the marshal for the Eastern District of Louisiana, at New Orleans, within ten days from the day the mandate bears date preparatory to a removal under the warrant heretofore issued by the District Judge of that district; or, in the alternative, that he surrender himself within such ten days into the custody of the marshal for the District of South Dakota at some place within that district, to be dealt with according to law.

Judgments in Nos. 341 and 342 affirmed.

Judgment in No. 705 reversed.